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SUBCOMMITTEE ON HUMAN RESOURCES
OF THE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

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BACKGROUND MATERIAL

# REGULATIONS ISSUED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ON CHILD CARE PROGRAMS AUTHORIZED BY PUBLIC LAW 101–508

Prepared for a Hearing To Be Held on September 17, 1991

SEPTEMBER 13, 1991

Prepared for the use of Members of the Committee on Ways and Means by members of its staff. This document has not been officially approved by the Committee and may not reflect the views of its Members

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## COMMITTEE ON WAYS AND MEANS
## U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS
DAN ROSTENKOWSKI, ILLINOIS, *Chairman*

ROBERT J. LEONARD, *Chief Counsel and Staff Director*

This document was prepared by the majority staff of the Committee on Ways and Means and is issued under the authority of Chairman Dan Rostenkowski. This document has not been reviewed or officially approved by the Members of the Committee.

# PREFACE

This document has been prepared for use by the Members of the Subcommittee on Human Resources, Committee on Ways and Means, at a hearing on September 17, 1991, on the Department of Health and Human Services' implementing regulations for two new child care programs authorized by P.L. 101–508.

In early September, 1991, the Acting Chairman of the Subcommittee on Human Resources requested that the Congressional Research Service prepare a background report on selected issues relating to the Department's implementing regulations. This document contains the CRS background report; statutory language, proposed regulations and conference report provisions for the two child care programs; and selected comments received by the Department of Health and Human Services regarding its implementing regulations.

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**FOR IMMEDIATE RELEASE**
**TUESDAY, AUGUST 20, 1991**

**PRESS RELEASE #12**
**SUBCOMMITTEE ON HUMAN RESOURCES**
**COMMITTEE ON WAYS AND MEANS**
**U.S. HOUSE OF REPRESENTATIVES**
**1102 LONGWORTH HOUSE OFFICE BLDG.**
**WASHINGTON, D.C. 20515**
**TELEPHONE: (202) 225-1721**

# THE HONORABLE THOMAS J. DOWNEY (D., N.Y.), ACTING CHAIRMAN, SUBCOMMITTEE ON HUMAN RESOURCES, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES AN OVERSIGHT HEARING ON THE ADMINISTRATION'S PROPOSED FEDERAL CHILD CARE REGULATIONS

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The Honorable Thomas J. Downey (D., N.Y.), Acting Chairman, Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee will hold an oversight hearing on the Department of Health and Human Services' proposed regulations for implementing the State grants for child care that were enacted pursuant to the Omnibus Budget Reconciliation Act of 1990. The hearing will be held on Tuesday, September 17, 1991, beginning at 10:00 a.m., in room H-137 of the Capitol.

In announcing the hearing, Acting Chairman Downey said: "A major success of the 101st Congress was the enactment of a child care bill that would provide income and work support to thousands of low- and moderate-income families each year. At this hearing, we will review the Administration's proposed rules for implementing the two State grants for child care that were included in the legislation. Implemented properly, these grants will ensure greater access to safe child care for many American families struggling to remain in the labor force."

The Omnibus Budget Reconciliation Act of 1990 was signed into law on November 5, 1990. The child care provisions of the Act include a new entitlement grant to the States for child care authorized under title IV-A of the Social Security Act, and a discretionary grant program for child care services, called the Child Care and Development Block Grant.

Under the title IV-A grant program, States are collectively entitled to up to $300 million per year to provide child care to families who need the care in order to work and would otherwise be at risk of becoming eligible for Aid to Families with Dependent Children (cash welfare benefits). Each State's allotment is based on its child population in relation to the overall U.S. child population. The program targets a low-income population, but specific eligibility criteria are left for the States to devise. States may provide care directly, or choose a range of delivery options. All care must meet standards of State and local law. Except for providers who provide care solely to family members, providers who participate in the program must be licensed, regulated or registered by the State. Care must be provided on a sliding-fee-scale basis, with contributions based on the family's ability to pay. A State match equal to the matching rate for the Medicaid program is required.

The Child Care and Development Block Grant authorizes $750 million for fiscal year 1991, and increases to $925 million for fiscal year 1993. Seventy-five percent of a State's allocation must be used to provide child care services and for activities to improve the availability and quality of child care. The remaining 25 percent must be used for quality improvements and to increase the availability of early childhood development and before- and after-school services. Under the program, States may provide care to certain children who are under age 13, and who come from a family whose income is less than 75 percent of the median income of the State for a family of the same size.

States must establish a sliding-fee scale, with contributions based on the family's income and size. Beginning with fiscal year 1993, States must give program beneficiaries the option of enrolling their children with a provider that has a grant or contract, or receiving a child care certificate. States must certify that certain health and safety requirements are established for child care providers, and must demonstrate that compliance procedures are in effect. Eligible providers must be licensed, regulated or registered, and must comply with applicable State and local licensing and regulatory requirements.

Half of any funds appropriated for the program will be allocated on the basis of the number of children ages 4 or younger in the State, and half on the number of children receiving free and reduced-price school lunches. Both factors are adjusted based on per-capita personal income in the State. There is no State match required for this program.

At this hearing, testimony will be heard from Administration officials and public witnesses. Testimony should focus on the Administration's regulations as they relate to both programs and the extent to which specific regulations conform to the law, promote streamlined and efficient program operations, promote State flexibility, and respect the needs of individual recipients.

Congressional Research Service
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Washington, D.C. 20540

September 10, 1991

TO : House Ways and Means Committee
Subcommittee on Human Resources

FROM : Anne Stewart
Analyst in Social Legislation
Education and Public Welfare Division

SUBJECT : **Background Report for Child Care Hearing**

In response to your request, the attached report describes the new child care programs authorized by P.L. 101-508 (the Title IV-A At-Risk Child Care Program and the Child Care and Development Block Grant) and selected issues related to the implementing regulations issued by the Department of Health and Human Services in June.

We hope this is useful to you. Please let us know if further assistance is needed.

Attachment

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# IMPLEMENTING REGULATIONS FOR NEW FEDERAL CHILD CARE PROGRAMS: SELECTED ISSUES

Prepared at the Request of the
Subcommittee on Human Resources
House Committee on Ways and Means
U.S. House of Representatives

Anne Stewart
Analyst in Social Legislation
Education and Public Welfare Division

September 10, 1991

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# IMPLEMENTING REGULATIONS FOR NEW FEDERAL CHILD CARE PROGRAMS: SELECTED ISSUES

## INTRODUCTION

During the final weeks of the 101st Congress, Congress and the White House reached agreement on a comprehensive child care package that was incorporated into the Omnibus Budget Reconciliation Act of 1990 and enacted into law on November 5, 1990 (P.L. 101-508).[1] The approval of major child care legislation was the culmination of a lengthy, and often politically and philosophically contentious debate.

The final compromise agreement included two new State child care programs, the At-Risk Child Care Program and the Child Care and Development Block Grant Program, as well as expansions to the Earned Income Tax Credit (EITC) program.[2] The At-Risk Child Care Program was authorized as an amendment to Title IV-A of the Social Security Act, which also establishes the Aid to Families with Dependent Children (AFDC) program. It is called the "At-Risk" program because it is targeted to low income families who need child care in order to work and who are "at-risk" of becoming eligible for AFDC if child care were not provided. The Child Care and Development Block Grant Program was authorized as an amendment to the Omnibus Budget Reconciliation Act of 1981, and is targeted to child care services for low income families, as well as for activities to improve the overall quality and supply of child care for families in general.

The At-Risk program was authorized as a "capped entitlement" under which States are entitled to matching funds for child care expenditures up to State limits determined by a formula in the law.[3] The Child Care and Development Block Grant is not a State entitlement program. Appropriated funds are distributed to States based on a formula in law, and no match is required.

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[1] Most of the action on child care legislation in the 101st Congress occurred on H.R. 3 and S. 5. Conference negotiations on these bills were never completed due to various unresolved issues, including conditions set by the Administration to avoid Presidential veto. The child care package incorporated into the budget law reflects several agreements that were reached during conference committee negotiations.

[2] Tax credit expansions, though not targeted in any way for child care, were advocated by the Bush Administration and others as an approach to increase child care options of low income families. It was argued that the increased income afforded by tax credits could be used to purchase non-parental care or could help one parent afford to forgo employment and remain home to care for the children. EITC expansion enjoyed bipartisan support, since others regarded it not as an approach to child care assistance, but as a means of improving the eroding economic status of low income working families. For more information on EITC and the recent expansions, see U.S. Library of Congress. Congressional Research Service. *The Earned Income Tax Credit: A Growing Form of Aid to Children.* CRS Report for Congress No. 91-402 EPW, by James R. Storey. Washington, May 3, 1991.

Though both of the new State programs are self-contained programs that were developed largely independent of one another (they fall under different authorizing committee jurisdictions) and have different features, they share certain broad policy goals. First, they are both aimed at improving the availability of child care services for low income families. Second, they both provide flexibility to States in administering and delivering child care services. Third, they both contain features emphasizing certain parental choice concerns. And fourth, they both rely on States, rather than the Federal Government, to regulate child care.

All of the funds under the At-Risk program and most of the funds under the Block Grant program are targeted for child care services for low income families. Under the Block Grant program, families with incomes at or below 75 percent of the State median are eligible for services, but States are directed to give priority to families with very low incomes. States have flexibility in setting eligibility rules for At-Risk child care, as long as they target low income families who need care in order to work, and are at-risk of becoming AFDC eligible if child care were not provided. Families receiving AFDC are not eligible for child care under the At-Risk program.

For both programs, the law emphasizes parental choice by allowing States to distribute funds directly to parents in the form of certificates or vouchers, with which they can purchase care that meets the program's requirements. Under the Block Grant program, States must give parents the option of receiving certificates or enrolling their child with a Block Grant funded provider. They have until October 1, 1992, to have certificate programs in place. Though certificates are intended to facilitate choice, the selection of providers actually available to families under these programs is limited by the allowable payment rates. The law and regulations provide more flexibility to States under the Block Grant program than under the At-Risk program for setting higher rates. Limits to the rates under both programs, however, will obviously restrict parents from choosing high cost child care.

The programs defer largely to the States with respect to regulating child care. Under both programs, child care providers receiving assistance are required to meet applicable State and local child care licensing and regulatory requirements, or be registered. The Block Grant includes additional requirements for health and safety, which are not included in the At-Risk program. Exceptions are made under both programs for family members taking care of their own children.

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[3] The At-Risk Child Care Program is the newest of three Federal child care programs authorized under Title IV-A of the Social Security Act. The other programs are for AFDC families who need child care in order to work or participate in education or training programs (AFDC Child Care) and for certain families who leave AFDC due to increased earnings (Transitional Child Care). Other major sources of Federal support for child care include--in addition to the Child Care and Development Block Grant--the Social Services Block Grant (Title XX of the Social Security Act) and the Child and Dependent Care Tax Credit.

Fewer funds are available for child care quality improvements than for child care services. Under the Block Grant, a small portion of funds is set aside for States to fund certain quality improvement activities, such as providing training to providers and enforcing State licensing requirements. The statute gives States some flexibility to use additional funds for quality, though regulations may have the effect of limiting their discretion in this area.

Differences between the programs include requirements pertaining to State administration, payment rates, eligibility, sectarian care, and funding. More detailed program descriptions are included in appendix A.

Now that Congress has established new child care initiatives, attention is focused on concerns about how these policies will be implemented. Among the questions being discussed are: To what extent will the new programs achieve the goals envisioned by Congress? What effect will they have on the constituencies they are intended to serve, namely, working parents and their children? How, if at all, will the programs be integrated and/or coordinated with the array of other public support for child care, such as AFDC, the Social Services Block Grant, and State-funded programs?

## IMPLEMENTING REGULATIONS AND SELECTED ISSUES

Implementing regulations were published in the *Federal Register* for the Child Care and Development Block Grant and the At Risk-Child Care Program on June 6, 1991, and June 25, 1991, respectively. For the Block Grant, the Department of Health and Human Services (DHHS) issued an "interim final rule." This rule is effective upon publication. DHHS justifies the issuance of interim final regulations, rather than proposed regulations, on the basis that Congress allowed only 10 months between passage of the Act and the availability of the appropriation (September 7, 1991) and start of the program. DHHS contends that this time period was not sufficient to complete the process needed to develop both proposed and final regulations; and that it was necessary to have regulations in place before States complete their State child care plans, required by the law.

For the At-Risk program, DHHS published a "proposed rule." Proposed rules do not have the force of law, but are often viewed as guidance in the absence of final regulations. Final regulations will be issued for both programs following consideration of written comments. Comments were due on August 5, 1991, for the Block Grant and on August 26, 1991, for the At-Risk program. DHHS has not set dates for publication of final regulations.

The child care regulations issued by DHHS have been the subject of media reports and numerous written comments submitted to DHHS. The focus of attention is on certain provisions that implement or propose to implement the programs with respect to parental choice assurances, State administrative flexibility, and child care standards requirements. Some Members of Congress and various organizations representing children and family advocates, State legislatures, State public welfare departments, and legal groups argue that the regulations inappropriately emphasize parental choice at the expense of other priorities established in the law, such as those for improving the quality of child care and granting States broad discretion in program operation and regulatory activities. Concerns have also been expressed that the regulations violate the intent of Congress and the statute itself. Other issues receiving less attention include DHHS' interpretation of the nondiscrimination provisions under the Block Grant program, and to what extent the regulations under both progams encourage coordinated child care systems.

The controversy surrounding the regulations stems from many of the same issues that fueled 3 years of debate on child care legislation preceding the enactment of P.L. 101-508. Concern about parental choice was among the most contentious issues. The debate focused largely on how the form of child care subsidies affects parental choice, specifically, whether choice is enhanced when a parent receives subsidies directly through tax credits or certificates versus when assistance is given to child care providers in the form of grants or contracts.

Parental choice concerns were also raised during discussions about the appropriateness of establishing Federal child care standards and what effect different levels of Federal regulatory requirements have on the supply of child care services. Critics of regulatory requirements argue that they drive up the cost of providing services, and force providers out of business or "underground." The result is fewer providers are available to families. Others maintain that well-designed standards eliminate unsafe care without threatening a parent's range of child care options. The issue of how to strike an appropriate balance between concerns about ensuring child care quality through regulation with concerns about ensuring sufficient child care has been widely debated. However, there are no national, comprehensive data on how regulation affects child care supply.

The following describes selected issues raised by the regulations with regard to parental choice, child care standards, and State flexibility. This list is in no way inclusive of all implementation issues that have been raised by various interested parties.

## At-Risk Child Care Program

### Child Care Standards Regulation

Under the *statute*, child care funded by the At-Risk program must meet applicable standards of State and local law. Providers (except those caring solely for family members) not required to meet State and local standards must, however, be registered.

The proposed *regulations* interpret "applicable standards" to mean licensing or regulatory requirements which apply to care of a particular type regardless of the source of payment for the care. DHHS explains in the preamble that a State cannot set separate standards that apply only to child care funded by the At-Risk program. In addition, if a State has standards which apply only to publicly funded care, a provider would not have to meet them as a condition of receiving At-Risk child care funds.[4] Only those standards that apply to all child care in the State apply to At-Risk child care.

DHHS states in the preamble that allowing States to apply separate or additional standards for At-Risk child care on the basis that such care is provided with public funds would unfairly limit the choice of providers for families, and, therefore, inhibit their ability to achieve self-sufficiency. Specifically, the regulation aims to protect families from choosing a provider, such as a relative or neighbor, and then discovering that the provider doesn't qualify for reimbursement unless it complies with certain requirements that wouldn't be required if the care was purchased with non-public funds. DHHS maintains that, by definition, families eligible for At-Risk child care subsidies need greater flexibility in securing child care arrangements since the purpose of the subsidy is to help families avoid AFDC dependency through working. Parents, they argue, should be free to choose from the same range of providers--centers, relatives, neighbors--as those not receiving subsidies. In an editorial supporting the regulation published in the *Washington Post*, a DHHS official contended that, allowing States to set higher standards for publicly funded care "is an invitation for states to regulate away many of the child care options available to the poor."[5] DHHS notes that States concerned about the quality of unregulated providers, could extend standards that apply to publicly funded care to all child care.

With regard to registration procedures, the regulation provides that States cannot go beyond collecting information needed to pay providers or to furnish them with information. In addition, the process cannot have the effect of excluding providers. In the preamble, DHHS states that registration should be a simple process, such as requiring names and addresses of providers. States cannot use a registration system for At-Risk providers that requires them to meet certain standards.

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[4] Some States require child care providers who are exempt from licensing laws--such as certain family day care homes, sectarian providers, and relatives--to meet standards or requirements if they receive public subsidies. The Children's Defense Funds estimates that 22 States require unlicensed family child care homes to be either self-certified or comply with certain standards in order to receive public subsidies. In addition, some States require licensed programs to meet additional requirements different from general licensing standards as a condition of receiving public funds. In general, the standards are to provide some degree of accountability for the expenditure of public funds.

[5] Jo Anne Barnhart, Choices for the Poor. *The Washington Post*, Aug. 27, 1991. p. A23.

The proposed regulation for child care standards under the At-Risk program has sparked intense debate. The main argument cited in opposition to the regulation is that it is counter to existing policies employed in some States in which providers who otherwise are exempt from regulation are required to meet certain health, safety or training requirements as a condition of receiving public funds. Supporters of these policies argue that child care paid for with public funds should be subject to some level of accountability, both to protect the health and safety of children and to protect States from potential liability if a child is injured in a publicly funded program. Concerns have been expressed that the regulation will preclude States from providing even the most modest and non-intrusive protections for child care supported by At-Risk funds. It is further argued that, rather than expanding parental choice, the regulation will limit the availability of safe care that can be purchased with At-Risk funds.

Concerns have also been raised that DHHS' registration regulation is too restrictive. Many States use registration as a flexible, informal, and low cost alternative to licensure to bring States into compliance with certain requirements. It is argued that by prohibiting States from including standards in their registration process, they will be forced to rely on the more formal licensure process, or forgo health and safety protections for children in child care funded by the At-Risk program. Concerns have also expressed that many existing State registration programs include requirements that exceed those allowed under the proposed regulation.

## Child Care and Development Block Grant Program

### Parental Choice Regulation

The *statute* requires States to assure that child care providers meet certain requirements as a condition of their receiving Block Grant funds. These include assurances that: 1) child care providers comply with State and local regulatory requirements, including, at State option, more stringent requirements than those applied to child care not funded by the Block Grant; 2) child care providers who are not required by State law to be licensed or regulated be registered;[6] and 3) child care providers (with the exception of grandparents, aunts, and uncles) comply with State-established health and safety standards addressing prevention and control of infectious diseases (including immunization), building and physical premises safety, and minimum health and safety training appropriate to the providers' setting.

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[6] Registration is a regulatory process that some States apply to child care providers who are exempt from licensing laws. States exempt certain providers from licensing laws based on the auspices under which they operate--such as sectarian or relative care--and the number of children they serve, such as family child care providers with few children. Registration programs vary widely, and can include such minimal requirements as name and address of provider and age of provider, to more extensive requirements involving inspections, letters of reference, and physical examinations of providers.

The *regulations* issued by DHHS on June 6, 1991 prohibit a State from receiving funds if the implementation of the above requirements results in parental choice being significantly restricted. According to the regulations, parental choice would be significantly restricted if "State or local rules, procedures or other requirements promulgated" with regard to these requirements have the effect of excluding categories of care (i.e., center-based, group home, family care, or in-home care), types of providers (such as non-profit centers, sectarian providers, or relatives) or significant numbers of providers in any category or type of care.

DHHS explains in the preamble that the regulation is necessary to balance "competing principles" in the statute and the legislative history--i.e., providing maximum parental choice versus allowing State flexibility to set child care requirements. The regulation aims to prevent States from establishing "excessive and ill-designed requirements or procedures" that could inhibit providers from participating in the program, and therefore, limit the selection of providers from which parents could choose. DHHS further provides that State discretion in meeting program requirements "may not be exercised at the expense of parental choice."

In the preamble, DHHS says that mandating automatic sprinkler systems for family day care homes is an example of a requirement that would likely have the effect of excluding family day care providers under the Block Grant, and would, therefore, be unacceptable under the regulation. Other examples that might fail the parental choice test have been provided during DHHS information forums on the regulations. These include requirements for criminal record checks. Examples of acceptable health and safety standards are given in the preamble and the actual regulation. These include requiring providers to comply with local building and fire codes (for meeting the building and physical premises safety requirement) and routinely supplying health and safety information through mailings and videotapes to family day care homes (for meeting the requirement for health and safety training that is appropriate to the day care setting).

Concerns have been expressed that the regulation will discourage States from establishing requirements adequate to protect the health and safety of children in child care funded by the Block Grant. Critics argue that the regulation undermines the requirements set in law, which were designed to give States flexibility in ensuring a minimum level of accountability for care funded by the Block Grant. They further argue that allowing parents options of child care providers through the use of vouchers shouldn't mean that unsafe care is one of the options they can choose with Federal subsidies.

The restrictions placed on States by the regulation in setting up a registration system have also been criticized. It is argued that States which already have a registration system in place for informal child care providers (such as neighbors) will not be able to use the same system for Block Grant funded providers if its requirements exceed requirements for name and address. It is argued that States may end up operating two registration programs if they want to require more extensive requirements aimed at protecting the health and safety of children. In addition, some contend that it would be difficult for States to predict in advance whether or not a particular health or safety requirement, registration or other requirement would "significantly" restrict providers or parental access.

### Availability of Certificates

Under the *statute*, parents who receive Block Grant assistance must be given the option of 1) enrolling their children with a provider that has a grant from or contract with the State Block Grant program or, 2) receiving a child care certificate with which they can purchase child care from eligible providers. Certificates are not an option in providing early childhood development and before- and after-school care under the 25 percent set aside. States have until October 1, 1992, to have a certificate program in place.

The *regulation* provides that child care certificates must be available to any parents offered services under the 75 percent share of a State's Block Grant allocation. In the preamble, DHHS interprets the statute to mean that certificates must be an option for any parent at any time, as long as Block Grant funds are available and that "parents who choose certificates must receive them rather than being placed on a waiting list for certificates or discovering that certificate funds are exhausted."

Concerns have been raised that DHHS' interpretation of the regulation will effectively limit or eliminate funds for grants and contracts since States are required to maintain the availability of funds for certificates on an on-going basis. It is argued that, parents, therefore, would be restricted in exercising their option of enrolling children with providers who are recipients of Block Grant grants or contracts. In addition, it is argued that contracts and grants--as opposed to vouchers--are a reliable funding means for many providers, particularly those in low income areas.

### Use of Funds Regulation

The *statute* requires States to spend 75 percent of their allotments on child care services and activities aimed at improving the quality and availability of child care. The remaining 25 percent of funds is targeted for early childhood development services, before- and after-school child care and quality improvement activities. The law does not set aside any funds for administrative expenses. The Conference Report states that a "preponderance" of the 75 percent of funds "be spent specifically on child care services and a minimum amount on other authorized activities."

The *regulations* specify that, for the first 2 years of a State's participation in the program, at least 85 percent of the 75 percent share must be for child care services, with no more than 15 percent designated for quality and availability improvement activities, and administrative expenses. In subsequent years, 90 percent of the 75 percent share must be for services, with no more than 10 percent of funds allowed for the other authorized activities.

In the preamble, DHHS explains that the regulation is based on the intent of Congress, as stated in the Conference Report. DHHS explains that a higher proportion of funds is allowed for activities other than services during the first 2 years of the program in recognition of higher administrative costs associated with program startup. The larger amount reserved for services, they assert, is to ensure that parents have sufficient opportunity to exercise parental choice.

Critics of the regulation argue that it interferes with State flexibility in using the 75 percent share. They further argue that requiring States to take administrative costs out of the quality and availability portion of the 75 percent set-aside will leave States with little or no flexibility in using funds from the 75 percent set-aside for quality and availability improvement activities. Administrative costs, particularly for certificate programs (which are required of all States) could be as high as 10 or 15 percent, according to some estimates. It is argued that States with lower quality child care systems would not be able to use funds on improvements under this portion of their allotment.

### Payment Rates Regulation

The *statute* requires payment rates for Block Grant-funded child care to be at a level that is sufficient to ensure equal access for eligible children to comparable child care services in the State or sub-state area that are provided to children not eligible for public subsidies. The payment rates must take into account variations in the costs of providing child care associated with different settings, different age groups and children with special needs.

The *regulations* allow States to set different payment rates based on categories of care (i.e., center based, group home, family care, or in home care); age; and special needs of children. Payment rates cannot be differentiated based on a type of provider (sectarian provider, for-profit provider, or relative) within a category of care. Payment rates, therefore, could not be different for licensed and unlicensed providers within a category of care.

Concerns have been raised that States are denied flexibility in setting higher payment rates for care that may have increased costs due to licensing. For example, center based programs that are subject to licensing requirements may have higher costs than a center-based program that is exempt from licensing, such as a sectarian sponsored center, but payment rates for both centers would have to be the same. It is argued that providers that meet licensing requirements operate higher quality programs than unlicensed or unregulated providers. By not allowing higher payment rates to regulated providers, no incentive is provided for improving the quality of care.

## APPENDIX A: PROGRAM DESCRIPTIONS

The following program descriptions are based on the statute, unless otherwise stated. References to the regulations issued by DHHS for each of the programs ("interim final" for the Block Grant and "proposed" for the At-Risk program) are included in instances when they propose substantial clarifications or interpretations of the statute.

### Title IV-A At-Risk Child Care Program

### Funding and Funds Distribution

The law permanently authorized $300 million annually for the program beginning in FY 1991. Effective October 1, 1990, States are entitled to Federal matching funds for allowable child care expenditures, up to State allocation limits. States receive funds based on their number of children under age 13 compared to the total number in the United States.

The match is the same as Medicaid matching rates, which vary by State. The proposed regulations allow public and private funds to be used as the State's share of expenditures. Public funds cannot be used if they are Federal funds or if they are used to match other Federal funds. If a State's grant award is less than its full allocation limit, the difference can be applied to the State allocation limit in the next year.

### Use of At-Risk Funds

All of the funds are for child care services. There are no set-asides for specific types of child care, such as care for school-age children, or for other kinds of child care activities, as required under the Child Care and Development Block Grant. The proposed regulations specifically state that At-Risk funds cannot be used for recruitment or training of child care providers, resource development, or licensing activities.

### Supplementation Rules

Funds cannot be used to supplant any other Federal or State funds for child care services. The proposed regulations require States to follow a process similar to that of the Child Care and Development Block Grant in determining funds spent during a base period.

### Family Eligibility

Families are eligible for child care if they are low income and not receiving AFDC, need care in order to work, and are at risk of becoming eligible for AFDC if child care were not provided. The proposed regulations give States flexibility in defining "low income" and "at risk of becoming eligible for AFDC." "In order to work" is defined by the regulations to mean those who need child care in order to accept employment or to remain employed. The regulations authorize care for up to 2 weeks prior to beginning work or for up to 1 month between jobs. Care is not authorized for families with parent(s) in school or training. The proposed regulations define eligible children as those under age 13, or, if physically or mentally incapable of caring for oneself, up to age 18 or 19, depending on the State's definition of dependent child under its AFDC program.

## Standards and Other Requirements of Child Care Providers Receiving At-Risk Assistance

Child care providers must meet applicable standards of State and local law. The proposed regulations define "applicable standards" as "licensing or regulatory requirements which apply to care of a particular type in the State, local area, or Indian reservation, regardless of the source of payment for the care." As explained in the preamble of the regulation, State standards that apply only to publicly-funded care, or to care funded only by the At-Risk program or the AFDC program, would not be considered applicable standards, because they are not generally applicable to care in the State.

In addition, all providers who are not required to meet applicable standards (with the exclusion of those providing care solely to family members) must be registered. The registration procedures, as described by the proposed regulations, must require only information necessary for the State to make payment or furnish information to the provider, be simple and timely, and not exclude or have the effect of excluding any categories of child care providers.

## Payment Mechanisms and Payment Rates

### Payment Mechanisms

States have flexibility in how they can provide child care services. They can provide care directly, arrange for care through providers using contracts or vouchers, provide cash or vouchers in advance to the family, reimburse the family, or make other arrangements they deem appropriate. The proposed regulations require States to have at least one payment method by which self arranged care can be paid, such as vouchers given in advance to parents or reimbursements to parents for child care expenses.

### Payment Rates

Payment rates for child care funded by the At-Risk program must be equal to the lesser of the actual cost of care or the "local market rate," as determined by the Secretary in regulations. Local market rate is defined in the proposed regulations in the same way as it is defined under AFDC child care--at the 75th percentile of the local market rate for the type of care being provided.[7] The regulations also allow States to establish a State-wide limit that is the same, higher, or lower as the limit established under the AFDC child care program.

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[7] The 75th percentile does not mean 75 percent of the cost of care. To determine the 75th percentile, child care rates are ranked from lowest to highest. Starting from the bottom of the list, the amount separating 75 percent (continued...)

Families are required to make some contribution to the cost of care, based on their ability pay. The regulations give States flexibility in constructing sliding fee scales.

### State Administrative Requirements

#### State Plan

The State agency responsible for administering the State's Title IV-A AFDC program is responsible for administering the At-Risk Child Care program. Regulations list the agency's duties to include preparing a State plan, establishing eligibility criteria, determining local market rates and the sliding fee scale, and submitting reports.

The proposed regulations require the At-Risk Child Care plan to be submitted to DHHS as an amendment to the State's Supportive Services Plan, which is required under the AFDC Jobs program. The At-Risk Child Care plan must provide assurances regarding child care standards and parental access and must describe the State program, including the registration process, local market rates, sliding fee scale and how child care is coordinated with federally funded child care programs. Beginning in FY 1995, the State Supportive Services Plan and the plan and application required under the Child Care and Development Block grant can be submitted at the same time.

The proposed regulations allow States to delegate other administrative functions, including making eligibility determinations, to other agencies.

#### Reports

Beginning in FY 1993, States are required to report annually to DHHS on how they used funds. Reports are to include information on the number of children served, the average cost of care, eligibility rules, child care licensing and regulatory requirements, and enforcement policies. Within 12 months of enactment, the Secretary is required to establish uniform reporting requirements for the States. In addition, the Secretary must report to Congress annually on the State reports. A report on the implementation of the program is due from the Secretary by July 1, 1992.

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[7](...continued)
of the providers with the lowest rates from the 25 percent with highest rates is the 75th percentile.

### Federal Administration

At the Federal level, the program is administered by the Administration of Children and Families, DHHS. There are no Federal administrative requirements contained in the statute.

## Child Care and Development Block Grant

### Funding

The program is authorized for 5 years, through FY 1995, at the following levels: $750 million for FY 1991, $825 million for FY 1992, $925 million for FY 1993, and "such sums as necessary" for FY 1994 and FY 1995. For FY 1991, $732 million was appropriated for the program by P.L. 101-517. These funds were available for obligation on September 7, 1991. States can obligate their allotments in the fiscal year in which they are received and in the succeeding fiscal year.

Funds are allocated according to a formula in law. The formula reserves up to 1.5 percent for the territories and up to 3 percent for Indian tribes and tribal organizations. Remaining funds are allocated to the States based on the States' proportion of children under age 5 and the number of children receiving free or reduced-priced school lunches, as well as the States' per capita income. States are not required to provide matching funds to receive Federal Block Grant funds.

### Use of Block Grant Funds

States can use Block Grant funds for child care services and activities to improve the quality and availability of child care. The law requires States to use **25 percent** of their allotments for activities to improve the quality of child care and to increase the availability of early childhood development and before- and after-school child care services. The remaining **75 percent** is for child care services *and* for activities to improve the quality and availability of child care. The Conference Report on the legislation (H. Rept. 101-964) states that a preponderance of the 75 percent funds should be spent on child care services and a minimum should be spent on other activities. Other requirements are specified by law and regulations with respect to use of each of these set-asides. They are described below.

#### Use of the Seventy-Five Percent Share

The regulations specify that, for the first 2 years of a State's participation in the program, at least 85 percent of these funds must be for services, with no more than 15 percent designated for quality and availability activities, as well as administrative expenses. (The law does not set aside any funds for administrative expenses.) In subsequent years, 90 percent of the 75 percent share must be for services, with no more than 10 percent of funds allowed for the other activities.

### Use of the Twenty-Five Percent Share

The law requires States to use at least 75 percent of the 25 percent share (18.5 percent of a State's total allotment) to establish, expand or operate, through grants or contracts, early childhood development or before- and after-school child care programs or both. Twenty percent (5 percent of total funds) must be used for at least one or more of the following quality improvement activities: providing assistance to resource and referral programs; providing grants or loans to assist providers in meeting applicable State and local child care standards; monitoring the compliance and enforcement of State and local regulatory requirements; providing training and technical assistance in relevant child care areas, such as health and safety, nutrition, first aid, child abuse detection and prevention; and improving salaries of child care workers. States can use the remaining 5 percent (1.25 percent) for any of the activities allowed under the 25 percent share.

### Supplementation Rules

States must assure in their State plans that block grant funds will be used to supplement, not supplant, Federal, State, and local funds spent for child care services and related programs. The regulations direct States to determine funds spent for child care services during an initial base year for measuring compliance with the requirement.

## Family Eligibility

Children under age 13 who come from families with incomes at or below 75 percent of the State median income and reside with parents (or parent) who are working, attending school, or in a job training program are eligible for services. Children also are eligible if they are receiving or need to receive protective services. Priority is to be given to serving children in very low income families and children with special needs. The regulations extend eligibility to children with disabilities up to age 18, or 19, depending on the State's definition of dependent child under its AFDC program. States have flexibility in defining "very low income" and "special needs."

## Standards and Other Requirements of Child Care Providers Receiving Block Grant Assistance

Child care providers receiving Block Grant assistance must meet all licensing or regulatory, requirements, including registration requirements, applicable under State or local law. Providers who are 18 years of age or older who care only for grandchildren, nieces, or nephews must be registered and comply only with any State requirements that govern relative care.

Providers that are *not* required by State or local law to be licensed or regulated must be registered with the State as a condition of funding. Registration procedures must be designed to facilitate payment and permit the State to inform providers of the availability of health and safety training, technical assistance, and other information. The regulations require registration to be a simple and timely process through which the State authorizes the provider to receive payment.

Providers (except grandparents, aunts and uncles) must also meet certain health and safety standards if they are not already doing so. The standards must cover: prevention and control of infectious diseases (including immunization); building and physical premises safety; and minimum health and safety training appropriate to the provider setting (i.e., center, family home, etc.) Parents must be afforded unlimited access to their children in care during the normal hours of program operation.

States have the option of imposing more stringent standards and requirements on child care providers funded under the program than those imposed on other providers in the State. Any reductions that are made in child care standards must be reported and explained to DHHS in the State's annual report on the program. In addition, States are required to conduct a one-time review of their child care licensing and regulatory requirements and policies. The requirement is to be waived if such a review was conducted in the last 3 years.

The regulations prohibit any State from receiving block grant funds if it imposes a requirement pertaining to the above provider requirements (health and safety standards, registration requirements, or more stringent requirements for block grant-funded care) that has the effect of restricting parental choice. Under the regulations, a provider requirement would restrict parental choice if it "expressly or effectively" excludes any category of care (such as center-based or family day care home) or type of provider (such as sectarian providers, for-profits or not-for-profits); has the effect of limiting parental access to or choice from among categories or types of providers; or excludes a significant number of providers from any category or type of care.

## Payment Mechanisms and Payment Rates

### Payment Mechanisms

States are required to give eligible families the option of 1) enrolling their children with an eligible provider that has a grant from or contract with the State's block grant program or 2) receiving a child care certificate with which they can purchase child care. This option only applies to funding for child care services from the 75 percent portion of the State's allocation. Certificates are not an option in providing early childhood development and before- and after-school care under the 25 percent set-aside. Parents using grants or contracts must be allowed to enroll their children with the eligible provider of their choice, to the maximum extent practicable.

Child care certificates can be used only to pay for child care services from eligible providers, including those of sectarian child care providers. Certificates must be issued directly to the parent and must be worth amounts that are commensurate with contract/grant values. States have until October 1, 1992 to have a certificate program in place. States are directed by the regulations to make the certificate option available to all families offered services under the program. Certificates can be checks or other disbursements, at the discretion of the State.

### Payment Rates

Payment rates for child care funded by the Block Grant must be sufficient to ensure equal access for eligible children to comparable child care in the State or sub-state area that is provided to children not eligible for Federal or State child care subsidies. In addition, the payment rates must take into account variations in the cost of child care due to setting, age of children, and special needs of children. The regulations allow different rates for different categories of care; i.e., center-based, group home, family day care, or in-home care. Rates, therefore, have to be set the same for different types of providers (such as relatives, sectarian care) within the same category. In addition, the regulations provide that, in setting payment rates, States cannot restrict parental choice by excluding any category of care or type of provider.

States must establish a sliding fee scale that provides for cost sharing by families. The regulations allow States to waive contributions from families with incomes at or below the Federal poverty level. The regulations prohibit States from using Block Grant funds to subsidize child care rates under the AFDC child care program or the At-Risk child care program.

## Provisions Related to Religious Providers and Religious Discrimination[8]

### Use of Block Grant Funds for Religious Activities

Use of funds for religious activities depends on the form in which financial assistance is received. A provider that receives operating assistance as the result of a direct grant from, or contract with, a government agency may not use the assistance for any sectarian purpose or activity, including religious worship and instruction. A provider that receives assistance as the result of child care certificates provided to parents, on the other hand, is not so limited. Such assistance may be used for any purpose related to child care, including religious worship and instruction.

### Provisions Related to Discrimination on Religious Grounds in Employment Practices of Providers

In general, child care providers that receive Block Grant assistance may not discriminate on religious grounds in their employment practices. But this prohibition is subject to several exceptions. First, it applies only with respect to the employment of persons whose primary responsibility involves working directly with children. It does not apply to such positions as janitor, accountant, and, arguably, director. Second, the prohibition does not apply at all to sectarian providers unless they receive 80 percent or more of their operating budgets from Federal and State assistance. If the total subsidy from all sources is less than 80 percent, a sectarian provider is free to require employees to adhere to its religious tenets and teachings and to rules forbidding the use of drugs or alcohol. Third, the regulations construe the Act to exempt from the prohibition providers that receive assistance only in the form of child care certificates, unless the total subsidy from State and Federal funds amounts to 80 percent or more of the provider's operating budget. Finally, notwithstanding the prohibition, all providers may give preference in employment to persons who are active participants in other activities of the organization that owns or operates the child care program.

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[8] Descriptions of these provisions were provided by David Ackerman of the Congressional Research Service, American Law Division.

### Provisions Related to Discrimination on Religious Grounds in Admitting Children to Programs and Providing Them Child Care Services

In general, child care providers that receive Block Grant assistance may not discriminate on religious grounds in admitting children to their programs or in providing services to them. But as with employment, this prohibition is subject to several exceptions. First, it does not apply at all to family child care providers unless 80 percent or more of their operating budgets stem from Federal and State assistance. Second, the regulations construe the Act to exempt from this prohibition providers that receive assistance only in the form of child care certificates, unless 80 percent or more of their operating budgets is provided by Federal and State assistance. Third, notwithstanding the prohibition, child care providers may give preference in admissions for child care slots not directly funded under the Act to children who themselves or whose families are active participants in other activities of the organization that owns or operates the child care program.

### Religious Child Care Providers' Eligibility for Block Grant Funds

In general, religious providers may receive assistance on the same basis as nonsectarian providers. But construction assistance can be used by such providers only to the extent necessary to bring their facilities into compliance with State health and safety requirements.

## State Administrative Requirements

### Application and State Plan

To participate, States must submit applications to DHHS containing State plans. The plan is to be developed by a "lead agency" designated by the Governor. The Conference Report states that the lead agency should be, to the maximum extent practicable, an agency in existence on or before the date of enactment with experience in administration of appropriate child care programs.

Initial State plans are to cover a 3-year period, with subsequent plans covering 2 years. In developing the plan, the lead agency is required to consult with relevant local government officials and conduct at least one public hearing on the provision of child care services under the plan. The plan must provide assurances that the Block Grant requirements--including those related to parental choice and State and local regulatory requirements--are met. A pre-print of the plan was made available by DHHS to States on June 21, 1991, in an Action Transmittal.

In addition to developing the State plan, the lead agency is required to coordinate the provision of services with other Federal, State, and local child care and early childhood development programs.

The regulations detail additional information that must be included in the application and State plan, including information about how the program will be administered and implemented and how funds will be used. The regulations allow States to share administrative and implementation activities with other entities as long as the lead agency retains overall responsibility. Sharing administrative arrangements must be governed by written contracts. In addition, the regulations require States to submit applications annually.

### Reports and Audits

States are required to report annually to the Secretary of DHHS on how they used their funds. Reports are to include information on the number of children served, types and number of providers assisted, child care staff salaries and compensation, improvements made in child care quality and availability, and descriptions of health and safety standards. States must also conduct program audits and submit reports to the State legislature and the Secretary of DHHS. The Secretary of DHHS must report to Congress annually on the State reports.

## Federal Administrative Requirements

At the Federal level, the program is administered by the Administration of Children and Families, DHHS. DHHS is required to coordinate all child care activities within the agency and with similar activities in other Federal agencies. DHHS is also required to publish a list of State child care standards at least once every 3 years, give technical assistance to the States in operating their block grant programs, and monitor State compliance with program requirements.

# STATUTORY LANGUAGE FOR THE TITLE IV-A AT-RISK CHILD CARE PROGRAM AND THE CHILD CARE AND DEVELOPMENT BLOCK GRANT PROGRAM

# (P.L. 101-508)

## Title IV-A At-Risk Child Care Program

***SEC. 5081. GRANTS TO STATES FOR CHILD CARE.***

*(a) RULES GOVERNING PROVISION OF CHILD CARE TO ELIGIBLE FAMILIES.—Section 402 (42 U.S.C. 602) is amended by adding at the end the following:*

*"(i)(1) Each State agency may, to the extent that it determines that resources are available, provide child care in accordance with paragraph (2) to any low income family that the State determines—*

*"(A) is not receiving aid under the State plan approved under this part;*

*"(B) needs such care in order to work; and*

*"(C) would be at risk of becoming eligible for aid under the State plan approved under this part if such care were not provided.*

*"(2) The State agency may provide child care pursuant to paragraph (1) by—*

*"(A) providing such care directly;*

*"(B) arranging such care through providers by use of purchase of service contracts or vouchers;*

*"(C) providing cash or vouchers in advance to the family;*

*"(D) reimbursing the family; or*

*"(E) adopting such other arrangements as the agency deems appropriate.*

*"(3)(A) A family provided with child care under paragraph (1) shall contribute to such care in accordance with a sliding scale formula established by the State agency based on the family's ability to pay.*

*"(B) The State agency shall make payment for the cost of child care provided under paragraph (1) with respect to a family in an amount that is the lesser of—*

*"(i) the actual cost of such care; and*

*"(ii) the applicable local market rate (as determined by the State in accordance with regulations issued by the Secretary).*

*"(4) The value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for the care) under this subsection—*

*"(A) shall not be treated as income or as a deductible expense for purposes of any other Federal or federally assisted program that bases eligibility for or amount of benefits upon need; and*

*"(B) may not be claimed as an employment-related expense for purposes of the credit under section 21 of the Internal Revenue Code of 1986.*

*"(5) Amounts expended by the State agency for child care under paragraph (1) shall be treated as amounts for which payment may be made to a State under section 403(n) only to the extent that—*

*"(A) such amounts are paid in accordance with paragraph (3)(B);*

*"(B) the care involved meets applicable standards of State and local law;*

*"(C) the provider of the care—*

*"(i) in the case of a provider who is not an individual that provides such care solely to members of the family of the individual, is licensed, regulated, or registered by the State or locality in which the care is provided; and*

*"(ii) allows parental access; and*

*"(D) such amounts are not used to supplant any other Federal or State funds used for child care services.*

*"(6)(A)(i) Each State shall prepare reports annually, beginning with fiscal year 1993, on the activities of the State carried out with funds made available under section 403(n).*

*"(ii) The State shall make available for public inspection within the State copies of each report required by this paragraph, shall transmit a copy of each such report to the Secretary, and shall provide a copy of each such report, on request, to any interested public agency.*

*"(iii) The Secretary shall annually compile, and submit to the Congress, the State reports transmitted to the Secretary pursuant to clause (ii).*

*"(B) Each report prepared and transmitted by a State under subparagraph (A) shall set forth with respect to child care services provided under this subsection—*

*"(i) showing separately for center-based child care services, group home child care services, family child care services, and relative care services, the number of children who received such services and the average cost of such services;*

*"(ii) the criteria applied in determining eligibility or priority for receiving services, and sliding fee schedules;*

*"(iii) the child care licensing and regulatory (including registration) requirements in effect in the State with respect to each type of service specified in clause (i); and*

*"(iv) the enforcement policies and practices in effect in the State which apply to licensed and regulated child care providers (including providers required to register).*

*"(C) Within 12 months after the date of the enactment of this subsection, the Secretary shall establish uniform reporting requirements for use by the States in preparing the information required by this paragraph, and make such other provision as may be necessary or appropriate to ensure that compliance with this subsection will not be unduly burdensome on the States.*

*"(D) Not later than July 1, 1992, the Secretary shall issue a report on the implementation of this subsection, based on such information as has been made available to the Secretary by the States.".*

*(b) PAYMENTS TO STATES.—Section 403 (42 U.S.C. 603) is amended by adding at the end the following:*

*"(n)(1) In addition to any payment under subsection (a) or (l), each State shall be entitled to payment from the Secretary of an amount equal to the lesser of—*

*"(A) the Federal medical assistance percentage (as defined in section 1905(b)) of the expenditures by the State in providing child care services pursuant to section 402(i), and in administering the provision of such child care services, for any fiscal year; and*

*"(B) the limitation determined under paragraph (2) with respect to the State for the fiscal year.*

*"(2)(A) The limitation determined under this paragraph with respect to a State for any fiscal year is the amount that bears the same ratio to the amount specified in subparagraph (B) for such fiscal year as the number of children residing in the State in the second preceding fiscal year bears to the number of children residing in the United States in the second preceding fiscal year.*

*"(B) The amount specified in this subparagraph is—*

*"(i) $300,000,000 for fiscal year 1991;*

*"(ii) $300,000,000 for fiscal year 1992;*

*"(iii) $300,000,000 for fiscal year 1993;*

*"(iv) $300,000,000 for fiscal year 1994; and*

*"(v) $300,000,000 for fiscal year 1995, and for each fiscal year thereafter.*

*"(C) If the limitation determined under subparagraph (A) with respect to a State for a fiscal year exceeds the amount paid to the State under this subsection for the fiscal year, the limitation determined under this paragraph with respect to the State for the immediately succeeding fiscal year shall be increased by the amount of such excess.*

*"(3) Amounts appropriated for a fiscal year to carry out this part shall be made available for payments under this subsection for such fiscal year.".*

*(c) AMENDMENTS TO GRANTS TO STATES TO IMPROVE CHILD CARE LICENSING AND REGISTRATION REQUIREMENTS, AND TO MONITOR CHILD CARE PROVIDED TO CHILDREN RECEIVING AFDC.—*

*(1) GRANTS INCREASED AND EXTENDED.—Section 402(g)(6)(D) (42 U.S.C. 602(g)(6)(D)) is amended by inserting ", and $50,000,000 for each of fiscal years 1992, 1993, and 1994" before the period.*

*(2) NEW PURPOSES FOR GRANTS.—Section 402(g)(6)(A) (42 U.S.C. 602(g)(6)(A)) is amended by striking "and to monitor child care provided to children receiving aid under the State plan approved under subsection (a)" and inserting "to enforce standards with respect to child care provided to children under this part, and to provide for the training of child care providers".*

*(3) HALF OF GRANT REQUIRED TO BE EXPENDED FOR TRAINING OF CHILD CARE PROVIDERS.—Section 402(g)(6) (42 U.S.C. 602(g)(6)) is amended by adding at the end the following:*

*"(E) Each State to which the Secretary makes a grant under this paragraph shall expend not less than 50 percent of the amount of the grant to provide for the training of child care providers.".*

*(d) COORDINATION WITH OTHER PROGRAMS FOR CHILDREN.—Section 402(g)(7) (42 U.S.C. 602(g)(7)) is amended by inserting "and subsection (i)" after "this subsection".*

*(e) EFFECTIVE DATE.—Except as otherwise expressly provided, the amendments made by this section shall take effect on October 1, 1990.*

# Child Care and Development Block Grant Program

***SEC. 5082. CHILD CARE AND DEVELOPMENT BLOCK GRANT.***

*Chapter 8 of subtitle A of title IV of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97–35) is amended—*

*(1) by redesignating subchapters C, D, and E, as subchapters D, E, and F, respectively; and*

*(2) by inserting after subchapter B the following new subchapter:*

### *"Subchapter C—Child Care and Development Block Grant*

***"SEC. 658A. SHORT TITLE.***

*"This subchapter may be cited as the 'Child Care and Development Block Grant Act of 1990'.*

***"SEC. 658B. AUTHORIZATION OF APPROPRIATIONS.***

*"There are authorized to be appropriated to carry out this subchapter, $750,000,000 for fiscal year 1991, $825,000,000 for fiscal year 1992, $925,000,000 for fiscal year 1993, and such sums as may be necessary for each of the fiscal years 1994 and 1995.*

***"SEC. 658C. ESTABLISHMENT OF BLOCK GRANT PROGRAM.***

*"The Secretary is authorized to make grants to States in accordance with the provisions of this subchapter.*

***"SEC. 658D. LEAD AGENCY.***

*"(a) DESIGNATION.—The chief executive officer of a State desiring to receive a grant under this subchapter shall designate, in an application submitted to the Secretary under section 658E, an appropriate State agency that complies with the requirements of subsection (b) to act as the lead agency.*

*"(b) DUTIES.—*

*"(1) IN GENERAL.—The lead agency shall—*

*"(A) administer, directly or through other State agencies, the financial assistance received under this subchapter by the State;*

*"(B) develop the State plan to be submitted to the Secretary under section 658E(a);*

*"(C) in conjunction with the development of the State plan as required under subparagraph (B), hold at least one hearing in the State to provide to the public an opportunity to comment on the provision of child care services under the State plan; and*

*"(D) coordinate the provision of services under this subchapter with other Federal, State and local child care and early childhood development programs.*

*"(2) DEVELOPMENT OF PLAN.—In the development of the State plan described in paragraph (1)(B), the lead agency shall consult with appropriate representatives of units of general purpose local government. Such consultations may include consideration of local child care needs and resources, the effectiveness of existing child care and early childhood development services, and the methods by which funds made available under this subchapter can be used to effectively address local shortages.*

*"SEC. 658E. APPLICATION AND PLAN.*

*"(a) APPLICATION.—To be eligible to receive assistance under this subchapter, a State shall prepare and submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary shall by rule require, including—*

*"(1) an assurance that the State will comply with the requirements of this subchapter; and*

*"(2) a State plan that meets the requirements of subsection (c).*

*"(b) PERIOD COVERED BY PLAN.—The State plan contained in the application under subsection (a) shall be designed to be implemented—*

*"(1) during a 3-year period for the initial State plan; and*

*"(2) during a 2-year period for subsequent State plans.*

*"(c) REQUIREMENTS OF A PLAN.—*

*"(1) LEAD AGENCY.—The State plan shall identify the lead agency designated under section 658D.*

*"(2) POLICIES AND PROCEDURES.—The State plan shall:*

*"(A) PARENTAL CHOICE OF PROVIDERS.—Provide assurances that—*

*"(i) the parent or parents of each eligible child within the State who receives or is offered child care services for which financial assistance is provided under this subchapter, other than through assistance provided under paragraph (3)(C), are given the option either—*

*"(I) to enroll such child with a child care provider that has a grant or contract for the provision of such services; or*

*"(II) to receive a child care certificate as defined in section 658P(2);*

*"(ii) in cases in which the parent selects the option described in clause (i)(I), the child will be enrolled with the eligible provider selected by the parent to the maximum extent practicable; and*

*"(iii) child care certificates offered to parents selecting the option described in clause (i)(II) shall be of a value commensurate with the subsidy value of child care services provided under the option described in clause (i)(I);*

*except that nothing in this subparagraph shall require a State to have a child care certificate program in operation prior to October 1, 1992.*

*"(B) UNLIMITED PARENTAL ACCESS.—Provide assurances that procedures are in effect within the State to ensure that child care providers who provide services for which assist-*

*ance is made available under this subchapter afford parents unlimited access to their children and to the providers caring for their children, during the normal hours of operation of such providers and whenever such children are in the care of such providers.*

*"(C) PARENTAL COMPLAINTS.—Provide assurances that the State maintains a record of substantiated parental complaints and makes information regarding such parental complaints available to the public on request.*

*"(D) CONSUMER EDUCATION.—Provide assurances that consumer education information will be made available to parents and the general public within the State concerning licensing and regulatory requirements, complaint procedures, and policies and practices relative to child care services within the State.*

*"(E) COMPLIANCE WITH STATE AND LOCAL REGULATORY REQUIREMENTS.—Provide assurances that—*

*"(i) all providers of child care services within the State for which assistance is provided under this subchapter comply with all licensing or regulatory requirements (including registration requirements) applicable under State and local law; and*

*"(ii) providers within the State that are not required to be licensed or regulated under State or local law are required to be registered with the State prior to payment being made under this subchapter, in accordance with procedures designed to facilitate appropriate payment to such providers, and to permit the State to furnish information to such providers, including information on the availability of health and safety training, technical assistance, and any relevant information pertaining to regulatory requirements in the State, and that such providers shall be permitted to register with the State after selection by the parents of eligible children and before such payment is made.*

*This subparagraph shall not be construed to prohibit a State from imposing more stringent standards and licensing or regulatory requirements on child care providers within the State that provide services for which assistance is provided under this subchapter than the standards or requirements imposed on other child care providers in the State.*

*"(F) ESTABLISHMENT OF HEALTH AND SAFETY REQUIREMENTS.—Provide assurances that there are in effect within the State, under State or local law, requirements designed to protect the health and safety of children that are applicable to child care providers that provide services for which assistance is made available under this subchapter. Such requirements shall include—*

*"(i) the prevention and control of infectious diseases (including immunization);*

*"(ii) building and physical premises safety; and*

*"(iii) minimum health and safety training appropriate to the provider setting.*

*Nothing in this subparagraph shall be construed to require the establishment of additional health and safety requirements for child care providers that are subject to health and safety requirements in the categories described in this subparagraph on the date of enactment of this subchapter under State or local law.*

*"(G) COMPLIANCE WITH STATE AND LOCAL HEALTH AND SAFETY REQUIREMENTS.—Provide assurances that procedures are in effect to ensure that child care providers within the State that provide services for which assistance is provided under this subchapter comply with all applicable State or local health and safety requirements as described in subparagraph (F).*

*"(H) REDUCTION IN STANDARDS.—Provide assurances that if the State reduces the level of standards applicable to child care services provided in the State on the date of enactment of this subchapter, the State shall inform the Secretary of the rationale for such reduction in the annual report of the State described in section 658K.*

*"(I) REVIEW OF STATE LICENSING AND REGULATORY REQUIREMENTS.—Provide assurances that not later than 18 months after the date of the submission of the application under section 658E, the State will complete a full review of the law applicable to, and the licensing and regulatory requirements and policies of, each licensing agency that regulates child care services and programs in the State unless the State has reviewed such law, requirements, and policies in the 3-year period ending on the date of the enactment of this subchapter.*

*"(J) SUPPLEMENTATION.—Provide assurances that funds received under this subchapter by the State will be used only to supplement, not to supplant, the amount of Federal, State, and local funds otherwise expended for the support of child care services and related programs in the State.*

*"(3) USE OF BLOCK GRANT FUNDS.—*

*"(A) GENERAL REQUIREMENT.—The State plan shall provide that the State will use the amounts provided to the State for each fiscal year under this subchapter as required under subparagraphs (B) and (C).*

*"(B) CHILD CARE SERVICES.—Subject to the reservation contained in subparagraph (C), the State shall use amounts provided to the State for each fiscal year under this subchapter for—*

*"(i) child care services, that meet the requirements of this subchapter, that are provided to eligible children in the State on a sliding fee scale basis using funding methods provided for in section 658E(c)(2)(A), with priority being given for services provided to children of families with very low family incomes (taking into consideration family size) and to children with special needs; and*

*"(ii) activities designed to improve the availability and quality of child care.*

"(C) ACTIVITIES TO IMPROVE THE QUALITY OF CHILD CARE AND TO INCREASE THE AVAILABILITY OF EARLY CHILDHOOD DEVELOPMENT AND BEFORE- AND AFTER-SCHOOL CARE SERVICES.—*The State shall reserve 25 percent of the amounts provided to the State for each fiscal year under this subchapter to carry out activities designed to improve the quality of child care (as described in section 658G) and to provide before- and after-school and early childhood development services (as described in section 658H).*

"(4) PAYMENT RATES.—

"(A) IN GENERAL.—*The State plan shall provide assurances that payment rates for the provision of child care services for which assistance is provided under this subchapter are sufficient to ensure equal access for eligible children to comparable child care services in the State or substate area that are provided to children whose parents are not eligible to receive assistance under this subchapter or for child care assistance under any other Federal or State programs. Such payment rates shall take into account the variations in the costs of providing child care in different settings and to children of different age groups, and the additional costs of providing child care for children with special needs.*

"(B) CONSTRUCTION.—*Nothing in this paragraph shall be construed to create a private right of action.*

"(5) SLIDING FEE SCALE.—*The State plan shall provide that the State will establish and periodically revise, by rule, a sliding fee scale that provides for cost sharing by the families that receive child care services for which assistance is provided under this subchapter.*

"(d) APPROVAL OF APPLICATION.—*The Secretary shall approve an application that satisfies the requirements of this section.*

**"SEC. 658F. LIMITATIONS ON STATE ALLOTMENTS.**

"(a) NO ENTITLEMENT TO CONTRACT OR GRANT.—*Nothing in this subchapter shall be construed—*

"(1) *to entitle any child care provider or recipient of a child care certificate to any contract, grant or benefit; or*

"(2) *to limit the right of any State to impose additional limitations or conditions on contracts or grants funded under this subchapter.*

"(b) CONSTRUCTION OF FACILITIES.—

"(1) IN GENERAL.—*No funds made available under this subchapter shall be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement (other than minor remodeling) of any building or facility.*

"(2) SECTARIAN AGENCY OR ORGANIZATION.—*In the case of a sectarian agency or organization, no funds made available under this subchapter may be used for the purposes described in paragraph (1) except to the extent that renovation or repair is necessary to bring the facility of such agency or organization into compliance with health and safety requirements referred to in section 658E(c)(2)(F).*

### *"SEC. 658G. ACTIVITIES TO IMPROVE THE QUALITY OF CHILD CARE.*

*"A State that receives financial assistance under this subchapter shall use not less than 20 percent of the amounts reserved by such State under section 658E(c)(3)(C) for each fiscal year for one or more of the following:*

*"(1) RESOURCE AND REFERRAL PROGRAMS.—Operating directly or providing financial assistance to private nonprofit organizations or public organizations (including units of general purpose local government) for the development, establishment, expansion, operation, and coordination of resource and referral programs specifically related to child care.*

*"(2) GRANTS OR LOANS TO ASSIST IN MEETING STATE AND LOCAL STANDARDS.—Making grants or providing loans to child care providers to assist such providers in meeting applicable State and local child care standards.*

*"(3) MONITORING OF COMPLIANCE WITH LICENSING AND REGULATORY REQUIREMENTS.—Improving the monitoring of compliance with, and enforcement of, State and local licensing and regulatory requirements (including registration requirements).*

*"(4) TRAINING.—Providing training and technical assistance in areas appropriate to the provision of child care services, such as training in health and safety, nutrition, first aid, the recognition of communicable diseases, child abuse detection and prevention, and the care of children with special needs.*

*"(5) COMPENSATION.—Improving salaries and other compensation paid to full- and part-time staff who provide child care services for which assistance is provided under this subchapter.*

### *"SEC. 658H. EARLY CHILDHOOD DEVELOPMENT AND BEFORE- AND AFTER-SCHOOL SERVICES.*

*"(a) IN GENERAL.—A State that receives financial assistance under this subchapter shall use not less than 75 percent of the amounts reserved by such State under section 658E(c)(3)(C) for each fiscal year to establish or expand and conduct, through the provision of grants or contracts, early childhood development or before- and after-school child care programs, or both.*

*"(b) PROGRAM DESCRIPTION.—Programs that receive assistance under this section shall—*

*"(1) in the case of early childhood development programs, consist of services that are not intended to serve as a substitute for a compulsory academic programs but that are intended to provide an environment that enhances the educational, social, cultural, emotional, and recreational development of children; and*

*"(2) in the case of before- and after-school child care programs—*

*"(A) be provided Monday through Friday, including school holidays and vacation periods other than legal public holidays, to children attending early childhood development programs, kindergarten, or elementary or secondary school classes during such times of the day and on such days that regular instructional services are not in session; and*

*"(B) not be intended to extend or replace the regular academic program.*

*"(c) PRIORITY FOR ASSISTANCE.—In awarding grants and contracts under this section, the State shall give the highest priority to geographic areas within the State that are eligible to receive grants under section 1006 of the Elementary and Secondary Education Act of 1965, and shall then give priority to—*

*"(1) any other areas with concentrations of poverty; and*

*"(2) any areas with very high or very low population densities.*

*"SEC. 658I. ADMINISTRATION AND ENFORCEMENT.*

*"(a) ADMINISTRATION.—The Secretary shall—*

*"(1) coordinate all activities of the Department of Health and Human Services relating to child care, and, to the maximum extent practicable, coordinate such activities with similar activities of other Federal entities;*

*"(2) collect, publish and make available to the public a listing of State child care standards at least once every 3 years; and*

*"(3) provide technical assistance to assist States to carry out this subchapter, including assistance on a reimbursable basis.*

*"(b) ENFORCEMENT.—*

*"(1) REVIEW OF COMPLIANCE WITH STATE PLAN.—The Secretary shall review and monitor State compliance with this subchapter and the plan approved under section 658E(c) for the State, and shall have the power to terminate payments to the State in accordance with paragraph (2).*

*"(2) NONCOMPLIANCE.—*

*"(A) IN GENERAL.—If the Secretary, after reasonable notice to a State and opportunity for a hearing, finds that—*

*"(i) there has been a failure by the State to comply substantially with any provision or requirement set forth in the plan approved under section 658E(c) for the State; or*

*"(ii) in the operation of any program for which assistance is provided under this subchapter there is a failure by the State to comply substantially with any provision of this subchapter;*

*the Secretary shall notify the State of the finding and that no further payments may be made to such State under this subchapter (or, in the case of noncompliance in the operation of a program or activity, that no further payments to the State will be made with respect to such program or activity) until the Secretary is satisfied that there is no longer any such failure to comply or that the noncompliance will be promptly corrected.*

*"(B) ADDITIONAL SANCTIONS.—In the case of a finding of noncompliance made pursuant to subparagraph (A), the Secretary may, in addition to imposing the sanctions described in such subparagraph, impose other appropriate sanctions, including recoupment of money improperly expended for purposes prohibited or not authorized by this*

*subchapter, and disqualification from the receipt of financial assistance under this subchapter.*

*"(C) Notice.—The notice required under subparagraph (A) shall include a specific identification of any additional sanction being imposed under subparagraph (B).*

*"(3) Issuance of rules.—The Secretary shall establish by rule procedures for—*

*"(A) receiving, processing, and determining the validity of complaints concerning any failure of a State to comply with the State plan or any requirement of this subchapter; and*

*"(B) imposing sanctions under this section.*

### *"SEC. 658J. PAYMENTS.*

*"(a) In General.—Subject to the availability of appropriations, a State that has an application approved by the Secretary under section 658E(d) shall be entitled to a payment under this section for each fiscal year in an amount equal to its allotment under section 658O for such fiscal year.*

*"(b) Method of Payment.—*

*"(1) In general.—Subject to paragraph (2), the Secretary may make payments to a State in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine.*

*"(2) Limitation.—The Secretary may not make such payments in a manner that prevents the State from complying with the requirement specified in section 658E(c)(3).*

*"(c) Spending of Funds by State.—Payments to a State from the allotment under section 658O for any fiscal year may be expended by the State in that fiscal year or in the succeeding fiscal year.*

### *"SEC. 658K. ANNUAL REPORT AND AUDITS.*

*"(a) Annual Report.—Not later than December 31, 1992, and annually thereafter, a State that receives assistance under this subchapter shall prepare and submit to the Secretary a report—*

*"(1) specifying the uses for which the State expended funds specified under paragraph (3) of section 658E(c) and the amount of funds expended for such uses;*

*"(2) containing available data on the manner in which the child care needs of families in the State are being fulfilled, including information concerning—*

*"(A) the number of children being assisted with funds provided under this subchapter, and under other Federal child care and pre-school programs;*

*"(B) the type and number of child care programs, child care providers, caregivers, and support personnel located in the State;*

*"(C) salaries and other compensation paid to full- and part-time staff who provide child care services; and*

*"(D) activities in the State to encourage public-private partnerships that promote business involvement in meeting child care needs;*

*"(3) describing the extent to which the affordability and availability of child care services has increased;*

*"(4) if applicable, describing, in either the first or second such report, the findings of the review of State licensing and regulatory requirements and policies described in section 658E(c), including a description of actions taken by the State in response to such reviews;*

*"(5) containing an explanation of any State action, in accordance with section 658E, to reduce the level of child care standards in the State, if applicable; and*

*"(6) describing the standards and health and safety requirements applicable to child care providers in the State, including a description of State efforts to improve the quality of child care;*

*during the period for which such report is required to be submitted.*

*"(b) Audits.—*

*"(1) Requirement.—A State shall, after the close of each program period covered by an application approved under section 658E(d) audit its expenditures during such program period from amounts received under this subchapter.*

*"(2) Independent auditor.—Audits under this subsection shall be conducted by an entity that is independent of any agency administering activities that receive assistance under this subchapter and be in accordance with generally accepted auditing principles.*

*"(3) Submission.—Not later than 30 days after the completion of an audit under this subsection, the State shall submit a copy of the audit to the legislature of the State and to the Secretary.*

*"(4) Repayment of amounts.—Each State shall repay to the United States any amounts determined through an audit under this subsection not to have been expended in accordance with this subchapter, or the Secretary may offset such amounts against any other amount to which the State is or may be entitles under this subchapter.*

### *"SEC. 658L. REPORT BY SECRETARY.*

*"Not later than July 31, 1993, and annually thereafter, the Secretary shall prepare and submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate a report that contains a summary and analysis of the data and information provided to the Secretary in the State reports submitted under section 658K. Such report shall include an assessment, and where appropriate, recommendations for the Congress concerning efforts that should be undertaken to improve the access of the public to quality and affordable child care in the United States.*

### *"SEC. 658M. LIMITATIONS ON USE OF FINANCIAL ASSISTANCE FOR CERTAIN PURPOSES.*

*"(a) Sectarian Purposes and Activities.—No financial assistance provided under this subchapter, pursuant to the choice of a parent under section 658E(c)(2)(A)(i)(I) or through any other grant or contract under the State plan, shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.*

*"(b) Tuition.—With regard to services provided to students enrolled in grades 1 through 12, no financial assistance provided under this subchapter shall be expended for—*

*"(1) any services provided to such students during the regular school day;*

*"(2) any services for which such students receive academic credit toward graduation; or*

*"(3) any instructional services which supplant or duplicate the academic program of any public or private school.*

### *"SEC. 658N. NONDISCRIMINATION.*

*"(a) RELIGIOUS NONDISCRIMINATION.—*

*"(1) CONSTRUCTION.—nothing in this section shall be construed to modify or affect the provisions of any other Federal law or regulation that relates to discrimination in employment on the basis of religion.*

*"(B) EXCEPTION.—A sectarian organization may require that employees adhere to the religious tenets and teachings of such organization, and such organization may require that employees adhere to rules forbidding the use of drugs or alcohol.*

*"(2) DISCRIMINATION AGAINST CHILD.—*

*"(A) IN GENERAL.—A child care provider (other than a family child care provider) that receives assistance under this subchapter shall not discriminate against any child on the basis of religion in providing child care services.*

*"(B) NON-FUNDED CHILD CARE SLOTS.—Nothing in this section shall prohibit a child care provider from selecting children for child care slots that are not funded directly with assistance provided under this subchapter because such children or their family members participate on a regular basis in other activities of the organization that owns or operates such provider.*

*"(3) EMPLOYMENT IN GENERAL.—*

*"(A) PROHIBITION.—A child care provider that receives assistance under this subchapter shall not discriminate in employment on the basis of the religion of the prospective employee if such employee's primary responsibility is or will be working directly with children in the provision of child care services.*

*"(B) QUALIFIED APPLICANTS.—If two or more prospective employees are qualified for any position with a child care provider receiving assistance under this subchapter, nothing in this section shall prohibit such child care provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates such provider.*

*"(C) PRESENT EMPLOYEES.—This paragraph shall not apply to employees of child care providers receiving assistance under this subchapter if such employees are employed with the provider on the date of enactment of this subchapter.*

*"(4) EMPLOYMENT AND ADMISSION PRACTICES.—Notwithstanding paragraphs (1)(B), (2), and (3), if assistance provided under this subchapter, and any other Federal or State program, amounts to 80 percent or more of the operating budget of a child care provider that receives such assistance, the Secretary*

*shall not permit such provider to receive any further assistance under this subchapter unless the grant or contract relating to the financial assistance, or the employment and admissions policies of the provider, specifically provides that no person with responsibilities in the operation of the child care program, project, or activity of the provider will discriminate against any individual in employment, if such employee's primary responsibility is or will be working directly with children in the provision of child care, or admissions because of the religion of such individual.*

*"(b) Effect on State Law.—Nothing in this subchapter shall be construed to supersede or modify any provision of a State constitution or State law that prohibits the expenditure of public funds in or by sectarian institutions, except that no provision of a State constitution or State law shall be construed to prohibit the expenditure in or by sectarian institutions of any Federal funds provided under this subchapter.*

*"SEC. 658O. AMOUNTS RESERVED; ALLOTMENTS.*

*"(a) Amounts Reserved.—*

*"(1) Territories and Possessions.—The Secretary shall reserve not to exceed one half of 1 percent of the amount appropriated under this subchapter in each fiscal year for payments to Guam, American Samoa, the Virgin Islands of the United States, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands to be allotted in accordance with their respective needs.*

*"(2) Indians tribes.—The Secretary shall reserve not more than 3 percent of the amount appropriated under section 658B in each fiscal year for payments to Indian tribes and tribal organizations with applications approved under subsection (c).*

*"(b) State Allotment.—*

*"(1) General rule.—From the amounts appropriated under section 658B for each fiscal year remaining after reservations under subsection (a), the Secretary shall allot to each State an amount equal to the sum of—*

*"(A) an amount that bears the same ratio to 50 percent of such remainder as the product of the young child factor of the State and the allotment percentage of the State bears to the sum of the corresponding products for all States; and*

*"(B) an amount that bears the same ratio to 50 percent of such remainder as the product of the school lunch factor of the State and the allotment percentage of the State bears to the sum of the corresponding products for all States.*

*"(2) Young child factor.—The term 'young child factor' means the ratio of the number of children in the State under 5 years of age to the number of such children in all States as provided by the most recent annual estimates of population in the States by the Census Bureau of the Department of Commerce.*

*"(3) School lunch factor.—The term 'school lunch factor' means the ratio of the number of children in the State who are receiving free or reduced price lunches under the school lunch program established under the National School Lunch Act (42 U.S.C. 1751 et seq.) to the number of such children in all the*

*States as determined annually by the Department of Agriculture.*

*"(4) ALLOTMENT PERCENTAGE.—*

*"(A) IN GENERAL.—The allotment percentage for a State is determined by dividing the per capita income of all individuals in the United States, by the per capita income of all individuals in the State.*

*"(B) LIMITATIONS.—If an allotment percentage determined under subparagraph (A)—*

*"(i) exceeds 1.2 percent, then the allotment percentage of that State shall be considered to be 1.2 percent; and*

*"(ii) is less than 0.8 percent, then the allotment percentage of the State shall be considered to be 0.8 percent.*

*"(C) PER CAPITA INCOME.—For purposes of subparagraph (A), per capita income shall be—*

*"(i) determined at 2-year intervals;*

*"(ii) applied for the 2-year period beginning on October 1 of the first fiscal year beginning on the date such determination is made; and*

*"(iii) equal to the average of the annual per capita incomes for the most recent period of 3 consecutive years for which satisfactory data are available from the Department of Commerce at the time such determination is made.*

*"(c) PAYMENTS FOR THE BENEFIT OF INDIAN CHILDREN.—*

*"(1) GENERAL AUTHORITY.—From amounts reserved under subsection (a)(2), the Secretary may make grants to or enter into contracts with Indian tribes or tribal organizations that submit applications under this section, for the planning and carrying out of programs or activities consistent with the purposes of this subchapter.*

*"(2) APPLICATIONS AND REQUIREMENTS.—An application for a grant or contract under this section shall provide that:*

*"(A) COORDINATION.—The applicant will coordinate, to the maximum extent feasible, with the lead agency in the State or States in which the applicant will carry out programs or activities under this section.*

*"(B) SERVICES ON RESERVATIONS.—In the case of an applicant located in a State other than Alaska, California, or Oklahoma, programs and activities under this section will be carried out on the Indian reservation for the benefit of Indian children.*

*"(C) REPORTS AND AUDITS.—The applicant will make such reports on, and conduct such audits of, programs and activities under a grant or contract under this section as the Secretary may require.*

*"(3) CONSIDERATION OF SECRETARIAL APPROVAL.—In determining whether to approve an application for a grant or contract under this section, the Secretary shall take into consideration—*

*"(A) the availability of child care services provided in accordance with this subchapter by the State or States in*

*which the applicant proposes to carry out a program to provide child care services; and*

*"(B) whether the applicant has the ability (including skills, personnel, resources, community support, and other necessary components) to satisfactorily carry out the proposed program or activity.*

*"(4) THREE-YEAR LIMIT.—Grants or contracts under this section shall be for periods not to exceed 3 years.*

*"(5) DUAL ELIGIBILITY OF INDIAN CHILDREN.—The awarding of a grant or contract under this section for programs or activities to be conducted in a State or States shall not affect the eligibility of any Indian child to receive services provided or to participate in programs and activities carried out under a grant to the State or States under this subchapter.*

*"(d) DATA AND INFORMATION.—The Secretary shall obtain from each appropriate Federal agency, the most recent data and information necessary to determine the allotments provided for in subsection (b).*

*"(e) REALLOTMENTS.—*

*"(1) IN GENERAL.—Any portion of the allotment under subsection (b) to a State that the Secretary determines is not required to carry out a State plan approved under section 658E(d), in the period for which the allotment is made available, shall be reallotted by the Secretary to other States in proportion to the original allotments to the other States.*

*"(2) LIMITATIONS.—*

*"(A) REDUCTION.—The amount of any reallotment to which a State is entitled to under paragraph (1) shall be reduced to the extent that it exceeds the amount that the Secretary estimates will be used in the State to carry out a State plan approved under section 658E(d).*

*"(B) REALLOTMENTS.—The amount of such reduction shall be similarly reallotted among States for which no reduction in an allotment or reallotment is required by this subsection.*

*"(3) AMOUNTS REALLOTTED.—For purposes of any other section of this subchapter, any amount reallotted to a State under this subsection shall be considered to be part of the allotment made under subsection (b) to the State.*

*"(f) DEFINITION.—For the purposes of this section, the term 'State' includes only the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.*

***"SEC. 658P. DEFINITIONS.***

*"As used in this subchapter:*

*"(1) CAREGIVER.—The term 'caregiver' means an individual who provides a service directly to an eligible child on a person-to-person basis.*

*"(2) CHILD CARE CERTIFICATE.—The term 'child care certificate' means a certificate (that may be a check or other disbursement) that is issued by a State or local government under this subchapter directly to a parent who may use such certificate only as payment for child care services. Nothing in this subchapter shall preclude the use of such certificates for sectarian*

*child care services if freely chosen by the parent. For purposes of this subchapter, child care certificates shall not be considered to be grants or contracts.*

*"(3) ELEMENTARY SCHOOL.—The term 'elementary school' means a day or residential school that provides elementary education, as determined under State law.*

*"(4) ELIGIBLE CHILD.—The term 'eligible child' means an individual—*

*"(A) who is less than 13 years of age;*

*"(B) whose family income does not exceed 75 percent of the State median income for a family of the same size; and*

*"(C) who—*

*"(i) resides with a parent or parents who are working or attending a job training or educational program; or*

*"(ii) is receiving, or needs to receive, protective services and resides with a parent or parents not described in clause (i).*

*"(5) ELIGIBLE CHILD CARE PROVIDER.—The term 'eligible child care provider' means—*

*"(A) a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that—*

*"(i) is licensed, regulated, or registered under State law as described in section 658E(c)(2)(E); and*

*"(ii) satisfies the State and local requirements, including those referred to in section 658E(c)(2)(F); applicable to the child care services it provides; or*

*"(B) a child care provider that is 18 years of age or older who provides child care services only to eligible children who are, by affinity or consanguinity, or by court decree, the grandchild, niece, or nephew of such provider, if such provider is registered and complies with any State requirements that govern child care provided by the relative involved.*

*"(6) FAMILY CHILD CARE PROVIDER.—The term 'family child care provider' means one individual who provides child care services for fewer than 24 hours per day, as the sole caregiver, and in a private residence.*

*"(7) INDIAN TRIBE.—The term 'Indian tribe' has the meaning given it in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(b)).*

*"(8) LEAD AGENCY.—The term 'lead agency' means the agency designated under section 658B(a).*

*"(9) PARENT.—The term 'parent' includes a legal guardian or other person standing in loco parentis.*

*"(10) SECONDARY SCHOOL.—The term 'secondary school' means a day or residential school which provides secondary education, as determined under State law.*

*"(11) SECRETARY.—The term 'Secretary' means the Secretary of Health and Human Services unless the context specifies otherwise.*

*"(12) SLIDING FEE SCALE.—The term 'sliding fee scale' means a system of cost sharing by a family based on income and size of the family.*

*"(13) STATE.—The term 'State' means any of the several States, the District of Columbia, the Virgin Islands of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.*

*"(14) TRIBAL ORGANIZATION.—The term 'tribal organization' has the meaning given it in section 4(c) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(c)).*

### *"SEC. 658Q. PARENTAL RIGHTS AND RESPONSIBILITIES.*

*"Nothing in this subchapter shall be construed or applied in any manner to infringe on or usurp the moral and legal rights and responsibilities of parents or legal guardians.*

### *"SEC. 658R. SEVERABILITY.*

*"If any provision of this subchapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions of applications of this subchapter which can be given effect without regard to the invalid provision or application, and to this end the provisions of this subchapter shall be severable.".*

# PROPOSED REGULATIONS, TITLE IV-A AT-RISK CHILD CARE PROGRAM AND INTERIM FINAL REGULATIONS, CHILD CARE AND DEVELOPMENT BLOCK GRANT PROGRAM

## Title IV-A At-Risk Child Care Program

~~they may be required by the IV–A agency to leave their children in child care arrangements while they attend mandatory work and training activities. But it is also important in protecting the guaranteed nature of transitional child care benefits. Employed families could well lose access to child care services of their choice and the guarantee would be substantially reduced if special standards were allowed. Furthermore, it would be antithetical to our overall goal of supporting the family in its quest for independence and self-sufficiency to interfere in so personal and critical a decision as who will take care of one's children while one must be away from them.~~

### ~~Applicable Standards~~

~~Section 402(g)(3)(B)(ii) of the Social Security Act limits federal financial participation (FFP) for child care provided to eligible AFDC recipients and former AFDC recipients to child care which meets "applicable standards of State and local law." This provision is contained in the final regulations at § 255.4(c)(2) which also included "Tribal law, where applicable." Questions have arisen about the meaning of this provision; the purpose of the proposed regulation is to clarify the meaning of applicable standards.~~

~~Child care for which there are no applicable standards, i.e., no licensing or regulatory requirements set by the State or locality that specifically regulates child care, is legal care. Under the Family Support Act, such care is available for use by AFDC recipients and former recipients eligible for transitional child care. For example, if a State does not regulate family day care providers caring for less than three children, such care is legal and, if the caretaker relative selects that provider, the State must pay for the care. In addition, if a provider is exempt from child care licensing requirements for reasons other than the source of payment, e.g., a sectarian child care center, such care would be legal because there are no applicable standards. Child care for which there are no standards will not be affected by this proposed regulation.~~

~~In addition, child care standards that are generally applicable are unaffected by this proposed regulation. Child care provided under section 402(g) has always been subject to any standard which is mandated in any law or regulation of the State or locality which generally applies to care of the same type in the State or locality, e.g., center care, group family day care, family day care, and in-home care. For example, we know that all States have child care licensure laws that include standards which address health and safety conditions and other aspects of care provided at child care centers. Since these are standards that have general applicability, they apply to title IV–A child care.~~

~~However, some States impose child care standards and regulations on publicly-funded child care that are not applicable to privately purchased care. The question has arisen whether, under title IV–A, a State may deny payment for child care which violates no general child care requirements in the State, but which does not meet an additional set of requirements which apply only to publicly-funded care. The proposed regulation at § 255.4(c)(2) precludes this. For child care funded under title IV–A, applicable standards include only those that are generally applicable to care of a particular type. A State may not set separate standards which apply only to title IV–A subsidized care. If a State has standards which affect only publicly-funded care, and a caregiver of that type of care does not meet them, for title IV–A purposes that care is still "legal," and the State must still pay for that care.~~

~~While we recognize that some States will be concerned that our proposed regulation will affect their role as stewards of public funds and their ability to protect children in publicly-funded child care, we believe that this impact is limited for the following reasons:~~

~~(1) Child care provided under section 402(g) has always been subject to any standard which is mandated in general law or regulation for child care of a particular type. A State which currently has health and safety standards that apply only to publicly-funded care could extend such standards to protect all children. Funding to assist States to do so is available through the licensing and monitoring grant under section 402(g)(6) of the Act and the Child Care and Development Block Grant Act of 1990.~~

~~(2) The proposed regulation does not require States to develop standards nor does it require that standards that States do have be uniform across all types of care.~~

~~(3) States have been paying for care, including informal care, that does not meet State standards for publicly-funded care, for years through the AFDC disregard.~~

~~(Catalog of Federal Domestic Assistance Programs: 93.021 Job Opportunities and Basic Skills Training, 93.036 At-Risk Child Care)~~

**List of Subjects in 45 CFR**

*Part 255*

Aid to Families with Dependent Children, Grant programs—social programs, Employment, education and training, Day care.

*Part 257*

Day care, Grant programs—social programs, reporting and recordkeeping requirements.

Dated: April 12, 1991.

**Jo Anne B. Barnhart,**
*Assistant Secretary for Family Support.*

Approved: April 25, 1991.

**Louis W. Sullivan, M.D.,**
*Secretary, Department of Health and Human Services.*

Accordingly, chapter II, title 45, Code of Federal Regulations is amended as set forth below:

### PART 255—CHILD CARE AND OTHER WORK-RELATED SUPPORTIVE SERVICES DURING PARTICIPATION IN EMPLOYMENT, EDUCATION, AND TRAINING

1. The authority citation for part 255 continues to read as follows:

Authority: Secs. 402, 403 and 1102 of the Social Security Act as amended (42 U.S.C. 602, 603 and 1302).

2. Section 255.4 is amended by revising paragraph (c)(2) to read as follows:

**§ 255.4 Allowable costs and matching rates.**

* * * * *

(c) * * *

(2) The care meets applicable standards of State and local law, and/or Tribal law, where applicable. Applicable standards are licensing or regulatory requirements which apply to care of a particular type in the State, local area, or Indian reservation regardless of the source of payment for the care.

* * * * *

3. A new part 257 is added to read as follows:

### PART 257—AT-RISK CHILD CARE PROGRAM

Sec.
257.0 Purpose.
257.10 State IV–A agency administration.
257.20 Requirement for a State At-Risk Child Care plan.
257.21 State plan content.
257.30 Eligibility.
257.31 Fee requirements.
257.40 Methods of providing child care.
257.41 Child care standards.
257.50 Reporting requirements.

Sec.
257.60 Availability of funding.
257.61 Grant awards.
257.62 Matching requirements.
257.63 Allowable expenditures.
257.64 Non-supplantation.
257.65 General administrative requirements.
257.66 Financial reporting.
257.67 Cost allocation.
257.68 Disallowance procedures.

Authority: Secs. 402, 403, and 1102 of the Social Security Act as amended (42 U.S.C. 602, 603, and 1302).

### § 257.0 Purpose.

This part pertains to the At-Risk Child Care program which permits States to provide assistance to low-income working families who need child care in order to work and are otherwise at risk of becoming eligible for AFDC.

### § 257.10 State IV–A agency administration.

(a) The State agency responsible for administering or supervising the State's title IV–A Plan is responsible for administering the At-Risk Child Care program.

(b) The following functions must be performed by the State IV–A agency:

(1) Planning for and design of the At-Risk Child Care program, including submission of the State Plan to the Secretary;

(2) Establishing eligibility criteria;

(3) Setting local market rates and the sliding fee scale;

(4) Issuing policies, rules, and regulations governing the program;

(5) Submitting reports required by the Secretary as specified at § 257.50;

(6) Submitting quarterly estimates and expenditure reports pursuant to § 257.61; and

(7) Submitting Standard Form LLL (SF–LLL) which assures that funds will not be used for political lobbying purposes, pursuant to Part 93 of this title, prior to the beginning of each fiscal year.

(c) Except for functions described in paragraph (b) of this section, the State IV–A agency may carry out the At-Risk Child Care program through arrangements or under contracts with other State or local administrative entities, or other public or private organizations.

(1) In doing so, the entity or organization must follow the policies, rules, and regulations of the State IV–A agency and must not have the authority to review, change, or disapprove any State IV–A agency administrative decision. Neither shall the entity or organization substitute its judgment for that of the State IV–A agency in the application of policies, rules and regulations promulgated by the State IV–A agency.

(2) Other entities or organizations may determine individual eligibility for the At-Risk Child Care program in accordance with rules established by the State IV–A agency.

### § 257.20 Requirement for a State At-Risk Child Care Plan.

(a) The State IV–A agency must submit the At-Risk Child Care Plan to the Secretary for approval.

(b)(1) The At-Risk Child Care Plan shall be submitted as an amendment to the State Supportive Services Plan which is defined at § 255.1.

(2) An At-Risk Child Care Plan may be submitted at any time during the quarter in which the State intends it to be effective. Upon its approval, the plan will be effective not earlier than the first day of the calendar quarter in which it is submitted.

(3) A State shall be entitled to its maximum grant, as defined at § 257.60(c), for any fiscal year in which it has an approved At-Risk Child Care Plan; however, it may not claim expenditures for any period prior to the effective date of the State Plan.

(c)(1) States operating an At-Risk Child Care program under an interim application approved prior to the issuance of At-Risk Child Care preprints shall submit a new At-Risk Child Care plan as an amendment to its Supportive Services Plan to the Secretary for approval after issuance of the preprint.

(2) The amendment required under paragraph (c)(1) of this section must be submitted in the quarter following the quarter in which the preprint is issued, to be effective not earlier than the first date of the calendar quarter in which it is submitted.

(3) A State with an approved interim application with a start date of October 1, 1990 may claim for expenditures for the period beginning October 1, 1990.

(d) A State that submits a plan to provide for At-Risk Child Care that is not approvable will be given the opportunity to make revisions before final disapproval; upon formal disapproval, a State may request a hearing pursuant to the process set forth in § 201.4 and part 213 of this chapter.

### § 257.21 State plan content.

A State's At-Risk Child Care plan must include the following:

(a) Assurances that:

(1) The State IV–A agency will, upon approval of the plan, administer the At-Risk Child Care Program in accordance with the requirements of sections 402(i) and 403(n) of the Act and the regulations under this part;

(2) Child care meets applicable standards of State and local law in accordance with § 257.41;

(3) All child care providers, except those giving care solely to members of their family, are licensed, regulated, or registered by the State or locality in which the care is provided in accordance with § 257.41;

(4) Any provider of child care must allow parental access, in accordance with § 257.41;

(5) Amounts expended by the State for child care under section 403(n) of the Act do not supplant any other Federal or State funds used for child care services;

(6) Child care provided or claimed for reimbursement is reasonably related to the hours of employment;

(7) Individuals are not discriminated against on the basis of race, sex, national origin, religion, or handicapping condition in access to the At-Risk Child Care program.

(b) Definitions of the following terms:

(1) At-Risk of being eligible for AFDC;

(2) Low income, as it will be used to determine eligibility for the program; and

(c) Any other eligibility criteria that the State adopts, pursuant to § 257.30;

(d) A description of the State's priorities for providing At-Risk Child Care;

(e) A description of the administrative structure, including what entity determines eligibility, as provided in § 257.10;

(f) If not provided statewide, a list of political subdivisions where the At-Risk Child Care program is offered;

(g) Methods the State agency will use to provide child care in accordance with § 257.40;

(h) A description of the State's registration process for unlicensed and uncertified providers including time frames for payment, in accordance with § 257.41(b);

(i) Local market rates, in accordance with § 257.63(a) and § 255.4(a) of this chapter;

(j) The statewide limit(s), if any, in accordance with § 257.63(b);

(k) The sliding fee scale under which families will contribute to the cost of care, in accordance with § 257.31. This includes the income rules used to calculate the family's contribution to the cost of care, in accordance with § 257.31;

(l) A description of the State's policy on providing child care during gaps in employment, in accordance with § 257.30(c);

(m) A description of coordination of At-Risk Child Care with existing IV–A child care programs, with other

Federally-funded child care programs, and with child care provided through other State, public, and private agencies; and

(n) The base period and the amount established for the base period, as provided in § 257.64.

### § 257.30 Eligibility.

(a) A family is eligible for child care under this part provided the family:

(1) Is low income, as defined in the approved State At-Risk Child Care Plan;

(2) Is not receiving AFDC;

(3) Is at risk of becoming eligible for AFDC, as defined in the approved At-Risk Child Care Plan;

(4) Needs such child care in order to accept employment or remain employed; and

(5) Meets such other conditions as the State may describe in its approved At-Risk Child Care Plan.

(b) The State may provide child care for any child in the family who needs such care and who:

(1) Is under age 13; or

(2) Is under age 18 (or under age 19, if the State so provides in its definition of dependent child in its State IV–A plan), and

(i) Is physically or mentally incapable of caring for himself or herself, as verified by the State based on a determination of a physician or a licensed or certified psychologist; or

(ii) Is under court supervision.

(c) A State IV–A agency may provide child care if child care arrangements would otherwise be lost:

(1) For up to two weeks prior to the start of employment; or

(2) For up to one month during a break in employment if subsequent employment is scheduled to begin within that period.

### § 257.31 Fee requirement.

(a) The State IV–A agency must require each family receiving At-Risk Child Care to contribute toward the payment for such care based on the family's ability to pay.

(b) Each State IV–A agency shall establish a sliding fee scale which will provide for some level of contribution by all recipients.

(c) The State IV–A agency may vary the period of collection for different fee levels.

(d) The State IV–A agency may establish whether fees are paid to the providers or to the State agency.

### § 257.40 Methods of providing child care.

(a) A State may use any of the following methods:

(1) Providing the care directly;

(2) Arranging the care through public or private providers by use of purchase of service contracts or vouchers;

(3) Providing cash or vouchers in advance to the caretaker relative so that the child care costs may be prepaid;

(4) Reimbursing the caretaker relative for child care expenses incurred; or

(5) Adopting such other arrangements as the agency deems appropriate, including certificates.

(b) If more than one type of child care is available, e.g., center, group family care or family day care, the caretaker relative must be provided an opportunity to choose the arrangement.

(c)(1) The State IV–A agency may select the method of payment under paragraph (a) of this section.

(2) The State IV–A agency must establish at least one method by which self-arranged child care can be paid.

(d) The State IV–A agency must coordinate its child care activities under this part with existing child care resource and referral agencies and with early childhood education programs in the State, including Head Start programs, preschool programs funded under chapter 1 of the Education Consolidation and Improvement Act of 1981, and school and nonprofit child care programs (including community-based organizations receiving funds designated for preschool programs for disabled children).

### § 257.41 Child care standards.

(a)(1) Child care provided with funds under this part must meet applicable standards of State and local law, and/or Tribal law.

(2) Applicable standards are licensing or regulatory requirements which apply to care of a particular type in the State, local area, or Indian reservation, regardless of the source of payment for the care.

(b)(1) All providers of care who are not required to meet applicable standards as provided in paragraph (a) of this section and who are not individuals providing care solely to members of the individual's family, must be registered by the State or locality in which the care is provided prior to receiving payment.

(2) Registration procedures must:

(i) Collect only such information about providers required to register, pursuant to paragraph (b)(1) of this section as is necessary for the State to make payment to the provider or furnish information to the provider;

(ii) Facilitate appropriate and prompt payments;

(iii) Allow providers to register with the State or locality after selection by the parent(s);

(iv) Be simple and timely;

(v) Not exclude or have the effect of excluding any categories of child care providers.

(c) Child care providers receiving At-Risk Child Care funding must afford parents unlimited access to their children, including written records concerning their children, and to providers caring for their children, during normal hours of provider operation and whenever the children are in the care of the provider.

### § 257.50 Reporting requirements.

(a) Beginning with FY 1993, the State IV–A agency shall prepare and submit an annual report to the Secretary that contains the following:

(1) The number of children receiving services and the average cost of such services separately by type of care, including center-based, group home, family, and relative care;

(2) The child care licensing and regulatory (including registration) requirements in effect in the State with respect to each type of care; and

(3) The enforcement policies and practices in effect in the State which apply to licensed and regulated child care providers (including providers required to register).

(b) The State IV–A agency shall submit its report to the Secretary no later than 90 days after the end of the federal fiscal year.

(c) The State IV–A agency shall make the report available for public inspection within the State and shall provide a copy of each report, on request, to any interested public agency.

### § 257.60 Availability of funding.

(a) A State agency is entitled to payments if it has an approved State At-Risk Child Care Plan. The payments are available only for the allowable expenditures of the program.

(b)(1) A State's limitation, i.e., share, from the national total of available funds for a fiscal year is based on the same ratio as the number of children under 13 residing in the State is to the national total of children under 13.

(2) The number of children under 13 for the States is derived from the best data available to the Secretary for the second preceding fiscal year, or for the Territories, the best data available for the closest fiscal year prior to the second fiscal year.

(c) The difference between the amount not paid to a State in a fiscal year and the State's limitation as described in paragraph (b) of this section for that same fiscal year may be added to a State's limitation for the following fiscal year. The total amount available in a fiscal year is referred to as a State's maximum grant for that year.

(d) For American Samoa, Guam, Puerto Rico, and the Virgin Islands, funding under this part is subject to the funding restrictions established under Section 1108 of the Social Security Act.

### § 257.61 Grant awards.

(a) States are required to submit estimates and report expenditures on a quarterly basis. Adjustments in subsequent quarters' grant awards will be made to reflect over- and under-estimates in prior quarters' expenditures.

(b) The total amount paid to a State in a fiscal year may not exceed the State's limitation or maximum grant for the fiscal year, whichever is appropriate.

(c) The regulations pertaining to State estimates and expenditures at § 201.5 of this chapter and the timely filing of claims at part 95, subpart A of this title apply to expenditures under this part.

### § 257.62 Matching requirements.

(a) Payments for child care services provided under this part and for the costs of administering them are available at the Federal Medical Assistance Percentage (FMAP) rate.

(b) Expenditures for the program will be matched at the FMAP rate applicable for the fiscal year in which expenditures are made.

(c) A State's share of expenditures must be in cash and may include public and private funds.

(1) Public funds may be considered as the State's share in claiming FFP when the funds are:

(i) Appropriated directly to the State or local agency, or transferred from another public agency (including Indian tribes) to the State or local agency and under its administrative control or certified by the contributing public agency as representing expenditures eligible for FFP;

(ii) Not used to match other Federal funds; and

(iii) Not Federal funds, or are Federal funds authorized by Federal law to be used to match other Federal funds.

(2) Funds donated from private sources may be considered as the State's share in claiming FFP when the funds:

(i) Are transferred to the State or local agency and under its administrative control;

(ii) Are donated without any restriction which would require their use for assisting a particular individual or organization or at particular facilities or institutions; and

(iii) Do not revert to the donor's facility or use either directly or indirectly.

(3) An amount equal to any funds received which do not meet the conditions of paragraphs (c) (1) and (2) of this section must be deducted from the State's expenditure claims subject to Federal matching.

(4) Third-party in-kind contributions may not be used.

(d) For American Samoa, Guam, and the Virgin Islands, the matching requirement for the first $200,000 in expenditures made in a fiscal year is waived.

### § 257.63 Allowable expenditures.

(a) FFP is available for the actual cost of child care, but not for more than the applicable local market rate.

(1) The applicable local market rate must be determined in accordance with the provisions of § 255.4 (a)(2) and (a)(3) of this chapter.

(b) The State agency may establish a statewide limit.

(1) The statewide limit may be the same as the statewide limits established at § 255.4(a)(1) of this chapter or may be a higher or lower amount:

(2) The State may specify a higher statewide limit for children with special needs.

(c) FFP is available for expenditures made in administering the provision of child care services under this part. FFP is not available for costs associated with the recruitment or training of child care providers, resource development, or licensing activities.

### § 257.64 Non-supplantation.

(a) Amounts expended by the State IV–A agency for child care under this Part shall not be used to supplant any other Federal or State funds used for child care services.

(b)(1) The State must determine the total amount of Federal and State funds expended during a base period (as defined in paragraph (b)(2) of this section) for child care services. States must assure that the amount of funding from other sources is maintained at the amount established for the base period.

(2) The base period will be a twelve-month period (e.g., the State fiscal year) which includes the month one year prior to the first month in which the State implements the At-Risk Child Care program.

(3) The amount established for the base period will be included in the State's At-Risk Child Care Plan.

### § 257.65 General administrative requirements.

The provisions of part 74 of this title (with the exception of subpart G, Matching and Cost Sharing, and subpart I, Financial Reporting Requirement) establishing uniform administrative requirements and cost principles shall apply to this program.

### § 257.66 Financial reporting.

(a) State estimates and expenditures will be reported on the financial reporting form for expenditures made under title IV–A.

(b) Contributions made by families for the cost of care where the State has made a full payment to the provider will be reported as program income and will be used to offset expenditures claimed as child care services payments. The requirements at § 74.42(c), subpart F of this title apply.

### § 257.67 Cost allocation.

A State agency shall amend its cost allocation plan to include the costs of the program, in accordance with the regulations at part 95, subpart E of this title.

### § 257.68 Disallowance procedures.

(a) Expenditures under this plan that do not meet the requirements of this part or the State At-Risk Child Care Plan are unallowable.

(b) The deferral and disallowances regulations of § 201.15 shall apply to this program. If the State IV–A agency disagrees with the decision to disallow FFP, it can appeal under existing title IV–A procedures; including review of the Departmental Appeals Board, in accordance with part 16 of this title.

[FR Doc. 91–14829 Filed 6–24–91; 8:45 am]

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# Child Care and Development Block Grant Program

(Catalog of Federal Domestic Assistance Programs: 93.039, Child Care and Development Block Grant.)

**List of Subjects**

*45 CFR Part 98*

Child Care, Grant program—social programs, Parental Choice, Reporting and recordkeeping requirements.

*45 CFR Part 99*

Administrative practice and procedure, Child care, Grant program—social programs.

Dated: May 24, 1991.

**Jo Anne B. Barnhart,**

*Assistant Secretary for Children and Families.*

Approved: May 30, 1991.

**Louis W. Sullivan,**

*Secretary, Department of Health and Human Services.*

Accordingly, title 45, subtitle A, Code of Federal Regulations is amended as set forth below:

1. A new part 98 is added to read as follows:

## PART 98—CHILD CARE AND DEVELOPMENT BLOCK GRANT

### Subpart A—Purposes and Definitions

Sec.
98.1 Purposes.
98.2 Definitions.
98.3 Effect on State law.

### Subpart B—General Application Procedures

98.10 Lead agency responsibilities.
98.11 Administration under contracts and agreements.
98.12 Coordination and consultation.
98.13 Application content and procedures.
98.14 Plan process.
98.15 Assurances.
98.16 Plan provisions.
98.17 Period covered by Plan.
98.18 Approval and disapproval of Plans and Plan amendments.

### Subpart C—Eligibility for Services

98.20 A child's eligibility for child care services.
98.21 A child's eligibility for early childhood development and before- and after-school care services.

### Subpart D—Program Operations (Child Care Services) Parental Rights and Responsibilities

98.30 Parental choice.
98.31 Parental access.
98.32 Parental complaints.
98.33 Consumer education.
98.34 Parental rights and responsibilities.

### Subpart E—Program Operations (Child Care Services) State and Provider Requirements

98.40 Compliance with applicable State and local regulatory requirements.
98.41 Health and safety requirements.
98.42 Sliding fee scales.
98.43 Payment rates.
98.44 Priority for child care services.
98.45 Registration.
98.46 Nondiscrimination in enrollment on the basis of religion.
98.47 Nondiscrimination in employment on the basis of religion.

### Subpart F—Use of Block Grant Funds

98.50 Child care services.
98.51 Activities to improve the quality of child care and to increase the availability of early childhood development programs and before- and after-school care services.
98.52 Administrative activities.
98.53 Supplementation.
98.54 Restrictions on the use of funds.
98.55 Cost allocation.

### Subpart G—Financial Management

98.60 Availability of funds.
98.61 Allotments for States.
98.62 Allotments for Territories and Tribes.
98.63 Reallotment.
98.64 Financial reporting.
98.65 Audits.
98.66 Disallowance procedures.
98.67 Fiscal requirements for contracts and agreements.

### Subpart H—Program Reporting Requirements

98.70 Annual report requirement.
98.71 Content of report.

### Subpart I—Indian Tribes

98.80 General procedures and requirements.
98.81 Application and Plan.
98.82 Coordination.
98.83 Requirements for Tribal programs.

### Subpart J—Monitoring, Non-Compliance and Complaints

98.90 Monitoring.
98.91 Non-compliance.
98.92 Penalties and sanctions.
98.93 Complaints.

Authority: 42 U.S.C. 9858.

### Subpart A—Purposes and Definitions

#### § 98.1 Purposes.

(a) The purpose of the Child Care and Development Block Grant is to increase the availability, affordability, and quality of child care services. The program offers Federal funding to States, Territories, Indian Tribes, and Tribal organizations in order to:

(1) Provide low-income families with the financial resources to find and afford quality child care for their children;

(2) Enhance the quality and increase the supply of child care for all families, including those who receive no direct assistance under the Block Grant;

(3) Provide parents with a broad range of options in addressing their child care needs;

(4) Strengthen the role of the family;

(5) Improve the quality of, and coordination among, child care programs and early childhood development programs; and

(6) Increase the availability of early childhood development and before- and after-school care services.

(b) The purpose of these regulations is to provide the basis for administration of the Child Care and Development Block Grant. These regulations provide that Grantees:

(1) Maximize parental choice through the use of certificates and through grants and contracts;

(2) Include in their programs a broad range of child care providers, including center-based, family child care, and in-home care, care provided by relatives and sectarian child care providers;

(3) Provide quality child care that meets applicable State and local requirements;

(4) Coordinate planning and delivery of services at all levels;

(5) Design flexible programs which provide for the changing needs of recipient families;

(6) Administer the Block Grant responsibly to ensure that statutory requirements are met and that adequate information regarding the use of public funds is provided;

(7) Maximize the impact of the additional funding available under the Block Grant by ensuring that Federal funds are used to supplement, not supplant, existing services, and ensuring that administrative costs are minimized; and

(8) Design programs which provide "seamless service" to families and providers, to the extent statutorily possible.

#### § 98.2 Definitions.

For the purpose of this part, and 45 CFR part 99:

(a) *The Act* refers to the Child Care and Development Block Grant Act of 1990, section 5082 of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508;

(b) *ACF* means the Administration for Children and Families;

(c) *The Application* is the request from a potential Grantee for funding under the Block Grant, and includes such information as the amount of funding requested and the projected budget for the program, pursuant to § 98.13;

(d) *Assistant Secretary* means the Assistant Secretary for Children and Families, Department of Health and Human Services, unless the context specifies otherwise;

(e) *Before- and after school services* means services which meet the requirements of § 98.51(e);

(f) *The Block Grant* means the Child Care and Development Block Grant; *Block Grant programs* will be used to generically describe all activities under the Block Grant, including child care services and quality and availability improvements pursuant to section 658E(c)(3)(B) of the Act, as well as quality and availability improvements, pursuant to sections 658E(c)(3)(C), 658G and 658H of the Act;

(g) *Caregiver* means an individual who provides child care services directly to an eligible child on a person-to-person basis;

(h) *Categories of care* means center-based child care, group home child care, family child care and in-home care;

(i) *Center-based child care provider* means a provider licensed or otherwise authorized to provide child care services for fewer than 24 hours per day per child in a nonresidential setting;

(j) *Child care certificate* means a certificate (that may be a check or other disbursement) that is issued by a Grantee directly to a parent who may use such certificate only as payment for child care services, pursuant to § 98.30. Nothing in this part shall preclude the use of such certificate for sectarian child care services if freely chosen by the parent. For the purposes of this part, a child care certificate is assistance to the parent, not assitance to the provider;

(k) *Child care provider that receives assistance* means a child care provider that receives Federal funds under the Block Grant pursuant to grants, contracts or loans, but does not include a child care provider to whom Federal funds under the Block Grant are directed only through the operation of a certificate program;

(l) *Child care services* means child care services pursuant to § 98.50;

(m) *The Department* means the Department of Health and Human Services;

(n) *Early childhood development program* means a program that meets the requirements of § 98.51(d);

(o) *Elementary school* means a day or residential school that provides elementary education, as determined under State law;

(p) *Eligible child* means an individual who meets the requirements of § 98.20;

(q) *Eligible child care provider* means:

(1) A center-based child care provider, a group home child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation that—

(i) Is licensed, regulated, or registered under applicable State or local law as described in § 98.40 or, if exempt from such requirements, is registered before receipt of payment as described in § 98.45; and

(ii) Satisfies State and local requirements, including those referred to in § 98.41 applicable to the child care services it provides; or

(2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the grandchild, niece, or nephew of such provider, if such provider is registered before receipt of payment and complies with any State requirements that govern child care provided by the relative involved.

(r) *Family child care provider* means one individual who provides child care services for fewer than 24 hours per day per child, as the sole caregiver, and in a private residence other than the child's residence;

(s) *Grantee* means the government, Tribe, or Tribal organization to which a grant is awarded and which is accountable for the use of the funds provided. The Grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document;

(t) *Group home child care provider* means two or more individuals who provide child care services for fewer than 24 hours per day per child, and in a private residence other than the child's own home;

(u) *Indian Tribe* means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(v) *In-home child care provider* means an individual who provides child care services in the child's own home;

(w) *Lead agency* means the agency designated under §§ 98.10 and 98.16(a)(1);

(x) *Licensing or regulatory requirements* means requirements necessary for a provider to legally provide child care services in a State or locality, including registration requirements established under State, local or Tribal law other than those required pursuant to § 98.41;

(y) *Liquidation period* means the one-year period following the obligation period;

(z) *Obligation period* means the time period during which a fiscal year's grant must be obligated;

(aa) *Parent* means a parent by blood, marriage or adoption and also means a legal guardian, or other person standing in loco parentis;

(bb) *The Plan* means the Plan for the implementation of programs under the Block Grant;

(cc) *Program period* means the time period during which a fiscal year's grant must be expended;

(dd) *Programs* will be used generically to describe all activities under the Block Grant, including Child Care Services pursuant to section 658E(c)(3)(B) of the Act as well as quality and availability improvements, pursuant to section 658E(c)(3)(C) of the Act;

(ee) *Provider* means the entity providing child care services;

(ff) *The regulation* refers to the actual regulatory text contained in 45 CFR parts 98 and 99;

(gg) *Secondary school* means a day or residential school which provides secondary education, as determined under State law;

(hh) *Secretary* means the Secretary of the Department of Health and Human Services unless the context specifies otherwise;

(ii) *Sectarian organization or sectarian child care provider* means religious organizations or providers generally, not merely those of a specific religious character or that are affiliated with a church or synagogue. The terms embrace any organization or provider that engages in religious conduct or activity or that seeks to maintain a religious identity in some or all of its functions. There is no requirement that a sectarian organization or provider be managed by clergy or have any particular degree of religious management, control, or content;

(jj) *Sectarian purposes and activities* means any religious purpose or activity, including but not limited to religious worship or instruction;

(kk) *Services for which assistance is provided* means all child care services funded under the Block Grant, either as assistance directly to child care providers through grants, contracts, or loans, or indirectly as assistance to parents through child care certificates;

(ll) *Sliding fee scale* means a system of cost sharing by a family based on income and size of the family, in accordance with § 98.42;

(mm) *State* means any of the States, the District of Columbia, the

Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands (Palau), and includes Tribes unless otherwise specified;

(nn) *Tribe and Tribal Grantee* refer to Indian Tribes and Tribal organizations as defined at paragraphs (u) and (oo) of this section;

(oo) *Tribal organization* means the recognized governing body of any Indian tribe; any legally established organization of Indians, including a consortium, which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organizations and which includes the maximum participation of Indians in all phases of its activities: Provided, that in any case where a contract is let or grant is made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant; and

(pp) *Types of providers* means the different classes of providers under each category of care. For the purposes of the Block Grant, types of providers include non-profit providers, for-profit providers, sectarian providers and relatives who provide care.

### § 98.3 Effect on State law.

(a) Nothing in the Act or this part shall be construed to supersede or modify any provision of a State constitution or State law that prohibits the expenditure of public funds in or by sectarian organizations, except that no provision of a State constitution or State law shall be construed to prohibit the expenditure in or by sectarian institutions of any Federal funds provided under this part.

(b) If a State law or constitution would prevent Federal Block Grant funds from being expended for the purposes provided in the Act, without limitation, then States must segregate State and Federal funds.

## Subpart B—General Application Procedures

### § 98.10 Lead agency responsibilities.

The lead agency, as designated by the chief executive officer of the State (or by the appropriate Tribal leader or applicant), shall:

(a) Administer the Block Grant program, directly or through other State agencies, in accordance with § 98.11;

(b) Submit an Application for funding under this part, pursuant to § 98.13;

(c) Consult with appropriate representatives of local government in developing a Plan to be submitted to the Secretary pursuant to § 98.14(b);

(d) Hold at least one public hearing in accordance with § 98.14(c); and

(e) Coordinate Block Grant services with other Federal, State and local child care and early childhood development programs, including such programs for the benefit of Indian children, pursuant to § 98.12.

### § 98.11 Administration under contracts and agreements.

(a) The lead agency has broad authority to share responsibilities for the administration of the program with other State agencies. In addition, the lead agency can share implementation of the program with other public or private local agencies. However,

(1) The lead agency must retain overall responsibility for the administration of the program, as defined in paragraph (b) of this section;

(2) The lead agency shall serve as the single point of contact for issues involving the administration of the Grantee's Block Grant program; and

(3) The sharing of administrative and implementation responsibilities must be governed by written agreements which specify the mutual roles and responsibilities of the lead agency and the other agencies in meeting the requirements of this part.

(b) In retaining overall responsibility for the administration of the program, the lead agency must:

(1) Determine the basic usage and priorities for the expenditure of Block Grant funds;

(2) Promulgate all rules and regulations governing the administration of the Plan which are in effect on a statewide basis;

(3) Submit all reports required by the Secretary;

(4) Ensure that the program complies with the approved Plan and all Federal requirements;

(5) Oversee the expenditure of funds by subgrantees and contractors;

(6) Monitor programs and services; and

(7) Fulfill the responsibilities of the Grantee in any complaint, compliance, hearing or appeal action under subpart J of this part or 45 CFR part 99.

### § 98.12 Coordination and consultation.

The lead agency must:

(a) Coordinate the provision of services for which assistance is provided under this part with other Federal, State, and local child care and early childhood development program and before- and after-school programs as provided under § 98.10(e).

(b) Consult, in accordance with § 98.14(b), with representatives of general purpose local government dur the development of the Plan; and

(c) Coordinate, to the maximum ext feasible, with any Indian Tribes in the State submitting Applications in accordance with subpart I of this part.

### § 98.13 Application content and procedures.

(a) An Application for Block Grant funds must be made by the chief executive officer of a State. The Application must contain:

(1) The program period, as defined i § 98.2(cc) for which the Application is made;

(2) The amount of funds requested f such period;

(3) An assurance that the Grantee w comply with the requirements of the A and this part;

(4) Pursuant to 45 CFR part 93, a lobbying certification which assures t the funds will not be used for purpose of political influence, and, if necessar a Standard Form LLL (SF–LLL) which discloses lobbying payments (Tribal applicants are not required to submit either the certification or form);

(5) Pursuant to 45 CFR 76.600, an assurance that the Grantee provides a drug-free workplace (if such a certification for all HHS grants has no already been submitted);

(6) A budget of expenditures, which provides an estimate of the use and distribution of Block Grant funds duri the period covered by the Application, including:

(i) A break-out of program activities under § 98.50 including a list of activit to improve the availability and qualit of child care (which includes administrative costs the Grantee anticipates will be necessary to carry out the stated purposes of the program and

(ii) A break-out of program activitie under § 98.51 including administrative costs which the Grantee anticipates w be necessary to carry out the stated purpose of the program; and

(iii) A detailed explanation and rationale for the budget expenditures, pursuant to § 98.50(d)(3), if not consistent with the requirements specified in § 98.50(d)(2);

(7) Pursuant to 45 CFR 76.500, certification that no principals have been debarred;

(8)(i) For the initial Application, the amount of Federal, State, and local public funds expended for the support child care and related programs during the base period, pursuant to § 98.53(b);

(ii) For subsequent Applications, the amount of such funds expended during the applicable subsequent period; and,

(iii) If applicable, information regarding the nature, extent and basis for reduction in Federal expenditures for programs other than the Block Grant, for the subsequent period;

(9) The Block Grant Plan, at times and in such manner as required in § 98.17; and

(10) Such other information as specified by the Secretary.

(b) Applications must be submitted annually at such time and in such manner as prescribed by the Secretary.

(c) In its initial Application, an Indian Tribe must provide a description of current service delivery skills, personnel, resources, community support, and other necessary components that will enable it to satisfactorily carry out the proposed Plan. Initial Applications submitted by consortia must also contain the additional information required under § 98.80(c)(1) and (c)(4).

### § 98.14 Plan process.

In the development of each Plan, as required pursuant to § 98.17, the lead agency shall:

(a) Coordinate the provision of Block Grant services with other Federal, State, and local child care and early childhood development programs, including such programs for the benefit of Indian children;

(b) Consult with appropriate representatives of local governments to consider local child care needs and resources, the effectiveness of existing child care and early childhood development services, and the methods by which Block Grant funds can be used to effectively address local child care shortages; and

(c) Hold at least one hearing, with adequate notice, to provide to the public an opportunity to comment on the provision of child care services under the Plan.

### § 98.15 Assurances.

The Block Grant Plan must include assurances that:

(a) Upon approval, the Grantee will have in effect a program which complies with the provisions of the Plan;

(b) The parent(s) of each eligible child within the State who receives or is offered child care services for which financial assistance is provided under § 98.50 is given the option either:

(1) To enroll such child with a child care provider that has a grant or contract for the provision of the service; or

(2) To receive a child care certificate as defined in § 98.2(j);

(c) In cases in which the parent(s), pursuant to § 98.30, elects to enroll their child with a provider that has a grant or contract with the lead agency, the child will be enrolled with the eligible provider selected by the parent to the maximum extent practicable;

(d) In accordance with § 98.30, the child care certificate offered to parents shall be of a value commensurate with the subsidy value of child care services provided under a grant or contract;

(e) The Grantee, in accordance with § 98.31, has procedures in place to ensure that providers of child care services, for which assistance is provided under the Block Grant, afford parents unlimited access to their children and to the providers caring for their children, during the normal hours of operations or whenever such children are in the care of such providers;

(f) The Grantee, as required by § 98.32, maintains a record of substantiated parental complaints and makes information regarding such complaints available to the public, on request;

(g) Consumer education information will be made available to parents and the general public within the State (or other areas served by the Grantee) concerning licensing and regulatory requirements, complaint procedures, and policies and practices relative to child care services within the State (or other areas served by the Grantee), as required by § 98.33;

(h) In accordance with § 90.40, all providers of child care services for which assistance is provided under the Block Grant will comply with all licensing and regulatory requirements, applicable under State or local law;

(i) Providers of child care services for which assistance is provided under the Block Grant that are not licensed or regulated for the purpose of providing child care under State or local law are required to be registered with the Grantee prior to payment being made and that such providers shall be permitted to register with the Grantee after selection by the parents of eligible children and before such payment is made, as required by § 98.45;

(j) There are in effect within the State (or other areas served by the Grantee), under State or local law, requirements designed to protect the health and safety of children that are applicable to child care providers that provide services for which assistance is made available under the Block Grant, pursuant to § 98.41;

(k) In accordance with § 98.41, procedures are in effect to ensure that child care providers of services for which assistance is provided under the Block Grant comply with all applicable State or local health and safety requirements;

(l) If the State reduces the level of standards applicable to child care services provided in the State (or other areas served by the Grantee) after November 5, 1990, the Grantee shall inform the Secretary of the rationale for such reduction in the annual report of the Grantee;

(m) The Grantee will, not later than 18 months after submission of the first Application, complete a full review of the law applicable to, and the licensing and regulatory requirements and policies of, each licensing agency that regulates child care services and programs in the State (or other areas served by the Grantee) unless the Grantee has reviewed such law, requirements, and policies in the three-year period ending on November 5, 1990;

(n) Pursuant to § 98.53, funds received through the Block Grant will be used only to supplement, not to supplant, the amount of Federal, State, and local funds otherwise expended for the support of child care services and related programs within the State (or other areas served by the Grantee); and

(o) Payment rates for the provision of child care services, in accordance with § 98.43, will be sufficient to ensure equal access for eligible children to comparable child care services in the State that are provided to children whose parents are not eligible to receive assistance under this program or under any other Federal or State programs.

### § 98.16 Plan provisions.

(a) A Block Grant Plan must contain the following:

(1) Specification of the lead agency whose duties and responsibilities are delineated in § 98.10;

(2) The assurances listed under § 98.15;

(3) A description of how the Block Grant program will be administered and implemented, if the lead agency does not directly administer and implement the program;

(4) A description of the coordination and consultation processes involved in the development of the Plan, pursuant to § 98.14 (a) and (b);

(5) A description of the public hearing process, pursuant to § 98.14(c);

(6) Definitions of the following terms for purposes of determining eligibility, pursuant to §§ 98.20(a) and 98.44:

(i) Special needs child;

(ii) Physical or mental incapacity (if applicable);

(iii) Attending (a job training or educational program);

(iv) Job training and educational program;

(v) Residing with;

(vi) Working;

(vii) Protective services; and

(viii) Very low income;

(7) For child care services and activities to improve the availability and quality of child care, pursuant to § 98.50:

(i) A description of such services and activities;

(ii) A list of political subdivisions in which such services and activities are offered, if such services and activities are not available statewide;

(iii) Provision for the reservation of 75 percent of these funds for such purposes, together with a plan for the allocation of, and prioritization of, such funds for such services and activities;

(iv) Any additional eligibility criteria or priority rules (with appropriate definitions) established pursuant to § 98.20(b); and

(v) Any eligibility criteria or priority rules for the receipt of grants and contracts by providers;

(8) For activities to improve the quality of child care and to increase the availability of early childhood development and before- and after-school care services:

(i) A description of such activities, pursuant to § 98.51;

(ii) A list of political subdivisions in which such activities are offered, if such activities are not available statewide;

(iii) Provision for the reservation of 25 percent of these funds for such purposes, together with a plan for allocation of, and prioritization of, such funds for such services and activities; and

(iv) Any additional eligibility criteria or priority rules for children receiving such services established pursuant to § 98.21(b), with appropriate definitions;

(v) A description of any eligibility criteria or priority rules for the receipt of grants and contracts by providers, in addition to those in § 98.51(c)(2);

(9) A description of the sliding fee scale(s) (including any factors other than income and family size used in establishing the fee scale(s)) that provide(s) for cost sharing by the families that receive child care services for which assistance is provided under the Block Grant, pursuant to § 98.42 for child care services under §§ 98.50 and 98.51 if applicable;

(10) A description of the minimum health and safety requirements, applicable to all providers of child care services for which assistance is provided under the Block Grant, in effect pursuant to § 98.41;

(11) A description of current and proposed child care certificate payment system(s), including the form or forms of the child care certificate, pursuant to § 98.30(c);

(12) A description of the methodology used to establish rates for reimbursement of child care services pursuant to § 98.43;

(13) A description of the registration process, including the timeframes within which payment will be made, pursuant to § 98.45;

(14) If the Grantee does not permit the expenditure of State funds for child care services unless certain requirements are met (e.g., a certification process), a description of the applicable process and timeframes;

(15) A description of activities that are planned to encourage public-private partnerships which promote business involvement in meeting child care needs, pursuant to § 98.71(b)(4);

(16) A description of the methodology used to establish the level of effort, if the Grantee chooses to use other than an aggregate basis, pursuant to § 98.53(b)(1); and

(17) For Tribal Plans, the basis for determining family eligibility pursuant to § 98.80(f).

(b) The Plan must address anticipated changes in services, activities, or other provisions that are expected over the life of the Plan.

### § 98.17 Period covered by Plan.

(a) For States and Territories, the initial Plan must cover a period of three years, and all subsequent Plans must cover a period of two years.

(b) For Indian Tribes, the initial Plan and any subsequent Plans must cover a period of two years.

(c) The lead agency must submit a new Plan prior to the expiration of the time period specified in paragraphs (a) and (b) of this section, at such time as required by the Secretary in written instructions.

### § 98.18 Approval and disapproval of Plans and Plan amendments.

(a) *Plan approval.* The Assistant Secretary will approve a Plan that satisfies the requirements of the Act and this part. Plans will be approved not later than the 90th day following the date on which the Plan submittal is received, unless a written agreement to extend that period has been secured.

(b) *Plan amendments.* Approved Plans must be amended whenever a substantial change in the program occurs. A Plan amendment must be submitted within 60 days of the effective date of the change. Plan amendments will be approved not later than the 90th day following the date on which the amendment is received, unless a written agreement to extend that period has been secured.

(c) *Appeal of disapproval of a Plan or Plan amendment.* (1) An applicant or Grantee dissatisfied with a determination of the Assistant Secretary pursuant to paragraphs (a) or (b) of this section with respect to any Plan or amendment may, within 60 days after the date of receipt of notification of such determination, file a petition with the Assistant Secretary asking for reconsideration of the issue of whether such Plan or amendment conforms to the requirements for approval under the Act and pertinent Federal regulations.

(2) Within 30 days after receipt of such petition, the Assistant Secretary shall notify the applicant or Grantee of the time and place at which the hearing for the purpose of reconsidering such issue will be held.

(3) Such hearing shall be held not less than 30 days nor more than 90 days after the notification is furnished to the applicant or Grantee, unless the Assistant Secretary and the applicant or Grantee agree in writing on another time.

(4) Action pursuant to an initial determination by the Assistant Secretary described in paragraphs (a) and (b) of this section that a Plan or amendment is not approvable shall not be stayed pending the reconsideration, but in the event that the Assistant Secretary subsequently determines that the original decision was incorrect, the Assistant Secretary shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied. The hearing procedures are described in part 99.

## Subpart C—Eligibility for Services

### § 98.20 A child's eligibility for child care services.

(a) In order to be eligible for services under § 98.50, a child must:

(1)(i) Be under 13 years of age; or

(ii) Be under age 18 (or 19, if the State so provides in its definition of dependent child in its plan under title IV–A of the Social Security Act) and be physically or mentally incapable of caring for himself or herself, or under court supervision;

(2) Reside with a family whose income does not exceed 75 percent of the State's median income for a family of the same size; and

(3)(i) Reside with a parent or parents (as defined in § 98.2(aa)) who are working or attending a job training or educational program; or

(ii) Receive, or need to receive, protective services and reside with a parent or parents (as defined in § 98.2(aa)) other than the parent(s) described in (a)(3)(i) of this section.

(b) Pursuant to § 98.16(a)(7)(iv), a Grantee or other administering agency may establish eligibility conditions or priority rules in addition to those specified in this section and § 98.44 so long as they do not:

(1) Discriminate against children on the basis of race, national origin, ethnic background, sex, religious affiliation, or handicap;

(2) Limit parental rights provided under subpart D; or

(3) Violate the provisions of this section, § 98.44, or the Plan. In particular, such conditions or priority rules may not be based on a parent's preference for a category of care or type of provider. In addition, such additional conditions or rules may not be based on a parent's choice of a child care certificate.

### § 98.21 A child's eligibility for early childhood development and before- and after-school care services.

(a) If a Grantee subsidizes, through grants or contracts under § 98.51, early childhood development services or before- and after-school care services for an individual child, the child must meet the eligibility conditions under § 98.20(a).

(b) Grantees may set additional conditions of eligibility or priority rules for children or families receiving such services funded under § 98.51, so long as such conditions do not violate the provisions of § 98.51(c)(2), or the Plan, and do not discriminate against children on the basis of race, national origin, ethnic background, sex, religious affiliation, or handicap.

## Subpart D—Program Operations (Child Care Services) Parental Rights and Responsibilities

### § 98.30 Parental choice.

(a) The parent or parents of an eligible child who receives or is offered child care services under § 98.50 must be offered a choice:

(1) To enroll the child with an eligible child care provider that has a grant or contract for the provision of such services; or

(2) To receive a child care certificate as defined in § 98.2(i).

(3) Such choice must be available anytime that child care services under § 98.50 are provided.

(b) When a parent elects to enroll the child with a provider that has a grant or contract for the provision of child care services, the child will be enrolled with the provider selected by the parent to the maximum extent practicable.

(c) In cases in which a parent elects to use a child care certificate, such certificate:

(1) Will be issued directly to the parent;

(2) Must be of a value commensurate with the subsidy value of the child care services provided under paragraph (a)(1) of this section;

(3) May be used for child care services provided by a sectarian organization or agency, including those that engage in religious activities, if those services are chosen by the parent;

(4) May be expended by providers for any sectarian purpose or activity, including sectarian worship or instruction; and

(5) Shall not be considered a grant or contract to a provider but shall be considered assistance to the parent.

(d) Child care certificate programs under paragraph (a)(2) of this section must be in operation by October 1, 1992.

(e) Child care certificates must be made available to any parents offered services under § 98.50.

(f) For services provided under § 98.50, certificates under paragraph (a)(2) of this section must permit parents to choose from a variety of child care categories, including:

(1) Center-based child care;

(2) Group home child care;

(3) Family child care; and

(4) In-home child care;

and under each of the above categories, care by a sectarian provider may not be limited or excluded.

(g) With respect to State and local regulatory requirements under § 98.40, health and safety requirements under § 98.41, payment rates under § 98.43, and registration requirements under § 98.45, Block Grant funds will not be available to a Grantee if State or local rules, procedures or other requirements promulgated for purposes of the Block Grant significantly restrict parental choice by:

(1) Expressly or effectively excluding:

(i) Any category of care or type of provider, as defined in § 98.2;

(ii) Any type of provider within a category of care; or

(2) Having the effect of limiting parental access to or choice from among such categories of care or types of providers, as defined in § 98.2; or

(3) Excluding a significant number of providers in any category of care or of any type as defined in § 98.2.

### § 98.31 Parental access.

Grantees must have in effect procedures to ensure that providers of child care services for which assistance is provided afford parents unlimited access to their children, and to the providers caring for their children, during normal hours of provider operation and whenever the children are in the care of the provider.

### § 98.32 Parental complaints.

Grantees must:

(a) Maintain a record of substantiated parental complaints; and

(b) Make information regarding such parental complaints available to the public on request.

### § 98.33 Consumer education.

Grantees must make available to parents and the general public consumer education information about all parental options and other policies and practices which relate to child care services, including any applicable licensing and regulatory requirements and complaint procedures.

### § 98.34 Parental rights and responsibilities.

Nothing under this part shall be construed or applied in any manner to infringe on or usurp the moral and legal rights and responsibilities of parents or legal guardians.

## Subpart E—Program Operations (Child Care Services) State and Provider Requirements

### § 98.40 Compliance with applicable State and local regulatory requirements.

(a) Grantees must provide assurances that:

(1) Within the area served by the Grantee, all providers of child care services for which assistance is provided under this part comply with any licensing or regulatory requirements, as defined in § 98.2(x), applicable under State, local, and Tribal law; and

(2) Providers that are not required to be licensed or regulated under State, local, or Tribal law are required to be registered, as described in § 98.45(a), with the Grantee prior to any payment being made under the Block Grant.

(b)(1) This section does not prohibit a State from imposing more stringent standards and licensing or regulatory requirements on child care providers of services for which assistance is provided under the Block Grant than the standards or requirements imposed on other child care providers.

(2) Any such additional requirements must be consistent with the safeguards for parental choice in § 98.30(g).

### § 98.41 Health and safety requirements.

(a) Although the Act specifically states it does not require the establishment of any new or additional requirements if existing requirements comply with the requirements of the statute, each Grantee must provide assurances that there are in effect, within the State (or other area served by the Grantee), under State, local or Tribal law, requirements designed to protect the health and safety of children that are applicable to child care providers of services for which assistance is provided under this part. Such requirements shall include:

(1) The prevention and control of infectious diseases (including immunization);

(2) Building and physical premises safety (e.g. compliance with local building and fire codes); and

(3) Minimum health and safety training appropriate to the provider setting (e.g. routinely supplying health and safety information).

(b) Grantees may not set health and safety standards and requirements under paragraph (a) of this section, that are inconsistent with the parental choice safeguards in § 98.30(g).

(c) If the Grantee reduces the level of standards applicable to any child care services provided in the State after November 5, 1990, the Grantee must inform the Secretary of the rationale for such reduction in its annual report, pursuant to § 98.71(e).

(d) Not later than eighteen months after submission of its initial Application in accordance with § 98.13, each Grantee must complete a full review of the law applicable to, and the licensing requirements and regulatory requirements and policies of, each licensing agency that regulates child care services and programs in the area served by the Grantee, unless the Grantee has reviewed such law, requirements and policies between November 5, 1987, and November 5, 1990. The findings of this review are to be included in either the first or second annual report pursuant to § 98.71(d).

(e) The requirements in paragraph (a) of this section apply to all providers of child care services for which assistance is provided under this part, within the area served by the Grantee, except the relatives specified in paragraph (g) of this section.

(f) Each Grantee shall assure that procedures are in effect to ensure that child care providers of services for which assistance is provided under this part, within the area served by the Grantee, comply with all applicable State or local health and safety requirements described in paragraph (a) of this section.

(g) For the purposes of this section, the term child care providers does not include grandparents, aunts, or uncles, pursuant to § 98.2(q)(2).

### § 98.42 Sliding fee scales.

(a) Grantees shall establish, and periodically revise, by rule, sliding fee scale(s) that provides for cost sharing by families that receive Block Grant child care services under §§ 98.50 and 98.51.

(b) Sliding fee scale(s) shall be based on income and the size of the family, and may be based on other factors as appropriate.

(c) Grantees may waive contributions from families whose incomes are at or below the poverty level for a family of the same size.

(d) The Grantee may apply different sliding fee scales to services under §§ 98.50 and 98.51.

### § 98.43 Payment rates.

(a) The Grantee must assure that the payment rates for the provision of child care under this part are sufficient to ensure equal access, in the area served by the Grantee, for eligible children to comparable child care services provided to children whose parents are not eligible to receive Block Grant assistance or child care assistance under any other Federal, State, or Tribal programs.

(b) In establishing payment rates, Grantees must take into account:

(1) Variations in the cost of providing child care:

(i) Between different categories (i.e., center-based, group home, family, in-home); and

(ii) To children of different age groups; and

(2) The additional costs of providing child care for children with special needs.

(c) Payment rates under paragraph (a) of this section must be consistent with the safeguards for parental choice in § 98.30(g).

(d) Nothing in this section shall be construed to create a private right of action.

(e) Payment rates established pursuant to this section must be available upon request to the Secretary.

### § 98.44 Priority for child care services.

Grantees must give priority for services provided under § 98.50(a)(1) to:

(a) Children of families with very low family income (considering family size); and

(b) Children with special needs.

### § 98.45 Registration.

(a) Grantees must assure that providers of child care services for which assistance is provided under t Block Grant who are not licensed or regulated under State or local law fo the purpose of providing child care a registered with the Grantee prior to receiving payment under the Block Grant.

(b) Grantee registration procedures

(1) Should facilitate appropriate an prompt payment to providers describ in paragraph (a) of this section;

(2) Should permit the Grantee to furnish information to such providers, including information on the availabil of health and safety training, technica assistance, and any relevant informat pertaining to applicable regulatory requirements; and

(3) Must allow providers to register with the Grantee after selection by the parent(s) of eligible children and befor the payment described in paragraph (a of this section is made.

(c) Registration under the Block Gra must be a simple, timely process throu which the Grantee authorizes the provider to receive payment for child care services.

(d) Both the registration requirement and the registration process under paragraph (a) of this section must be consistent with the safeguards for parental choice in § 98.30(g).

### § 98.46 Nondiscrimination in enrollment on the basis of religion.

(a) Child care providers (other than family child care providers, as defined in § 98.2(r)) that receive assistance through grants and contracts under the Block Grant shall not discriminate in admissions against any child on the basis of religion.

(b) Paragraph (a) of this section does not prohibit a child care provider from selecting children for child care slots that are not funded directly (i.e. through grants or contracts to providers) with assistance provided under the Block Grant because such children or their family members participate on a regular basis in other activities of the organization that owns or operates such provider.

(c) Notwithstanding paragraph (b) of this section, if 80 percent or more of the operating budget of a child care provider comes from Federal or State funds, including direct or indirect assistance under the Block Grant, the Grantee must assure that before any further Block Grant assistance is given to the provider,

(1) The grant or contract relating to the assistance, or

(2) The admission policies of the provider specifically provide that no person with responsibilities in the operation of the child care program, project, or activity will discriminate, on the basis of religion, in the admission of any child.

### § 98.47 Nondiscrimination in employment on the basis of religion.

(a) In general, except as provided in paragraph (b) of this section, nothing in this part modifies or affects the provision of any other applicable Federal law and regulations relating to discrimination in employment on the basis of religion.

(1) Child care providers that receive assistance through grants or contracts under the Block Grant shall not discriminate, on the basis of religion, in the employment of caregivers as defined in § 98.2(g).

(2) If two or more prospective employees are qualified for any position with a child care provider, this section shall not prohibit the provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates the provider.

(3) Paragraphs (a) (1) and (2) of this section shall not apply to employees of child care providers if such employees were employed with the provider on November 5, 1990.

(b) Notwithstanding paragraph (a) of this section, a sectarian organization may require that employees adhere to the religious tenets and teachings of such organization and to rules forbidding the use of drugs or alcohol.

(c) Notwithstanding paragraph (b) of this section, if 80 percent or more of the operating budget of a child care provider comes from Federal and State funds, including direct and indirect assistance under the Block Grant, the Grantee must assure that, before any further Block Grant assistance is given to the provider,

(1) The grant or contract relating to the assistance, or

(2) The employment policies of the provider specifically provide that no person with responsibilities in the operation of the child care program will discriminate, on the basis of religion, in the employment of any individual as caregiver.

## Subpart F—Use of Block Grant Funds

### § 98.50 Child care services.

(a) After reserving 25 percent of the amount provided under the Block Grant for each fiscal year for the activities specified in § 98.51, the remaining funds shall be expended for:

(1) Child care services which are provided in accordance with the provisions of paragraph (b) of this section; and

(2) Activities to improve the availability and quality of child care, as described under paragraph (c) of this section, and all other non-service expenditures.

(b) Child care services must be provided:

(1) To eligible children, as described in § 98.20;

(2) Using a sliding fee scale, as described in § 98.42;

(3) Using funding methods provided for in § 98.30; and

(4) Based on the priorities in § 98.44.

(c)(1) Activities designed to improve the availability and quality of child care include, but are not limited to, the activities specified in § 98.51(b)(2). For the purposes of this part, administrative costs must be included as availability and quality costs under § 98.50(a)(2).

(2) Pursuant to § 98.16(a)(7)(i), the Plan must specify the activities which the Grantee will fund under this paragraph.

(d)(1) States must spend a preponderance of the remaining funds under paragraph (a) of this section for services which they provide pursuant to paragraph (a)(1) of this section. They should spend a minimum amount on activities authorized under paragraph (a)(2) of this section.

(2) Except as provided in paragraph (d)(3) of this section, to meet the requirements of paragraph (d)(1) of this section:

(i) At least 90 percent of the funds reserved for assistance under this section must be expended for services pursuant to paragraph (a)(1) of this section, and

(ii) Not more than 10 percent of the funds may be expended for other authorized activities as described in paragraph (a)(2) of this section, including all administrative activities.

(3) For the first two years of a Grantee's operation of the program, at least 85 percent must be expended for services pursuant to paragraph (a)(1) of this section and up to 15 percent of the funds may be expended for the other authorized activities described in paragraph (a)(2) of this section, upon submission of an additional detailed justification pursuant to § 98.13(a)(6)(iii).

(e) The base amount, pursuant to § 98.62(b)(1)(i), of a Tribal Grantee's grant is exempt from the limitation in paragraph (d)(2) of this section.

### § 98.51 Activities to improve the quality of child care and to increase the availability of early childhood development programs and before- and after-school care services.

(a) The Grantee shall reserve 25 percent of the amount provided under the Block Grant for each fiscal year for the activities specified in this section.

(b) Each Grantee receiving funds to operate a program under this part shall use not less than:

(1) 18.75 percent of the total amount of a fiscal year's Block Grant funds to establish or expand and conduct, through the provision of grants or contracts:

(i) Early childhood development programs, operated in accordance with the provisions of paragraph (d) of this section;

(ii) Before- and after-school child care programs, operated in accordance with the provisions of paragraph (e) of this section; or

(iii) Both; and

(2) Five percent of the total amount of a fiscal year's Block Grant funds on one or more of the following activities to improve the quality of care:

(i) Operating directly or providing financial assistance to organizations (including private non-profit organizations, public organizations, and units of general purpose local government) for the development, establishment, expansion, operation, and coordination of resource and referral programs specifically related to child care;

(ii) Making grants or providing loans to child care providers to assist such providers in meeting applicable State, local, and Tribal child care standards, including applicable health and safety requirements, pursuant to §§ 98.40 and 98.41;

(iii) Improving the monitoring of compliance with, and enforcement of, applicable State, local, and Tribal requirements pursuant to §§ 98.40 and 98.41;

(iv) Providing training and technical assistance in areas appropriate to the provision of child care services, such as training in health and safety, nutrition, first aid, the recognition of communicable diseases, child abuse detection and prevention, and care of children with special needs; and

(v) Improving salaries and other compensation (such as fringe benefits) for full- and part-time staff who provide child care services for which assistance is provided under this part.

An additional one and one-quarter percent of the total funds received under the Block Grant may be used at the discretion of the Grantee for any of the purposes allowed in paragraph (b)(1) or (b)(2) of this section.

(c) For programs described in paragraph (b)(1) of this section, Grantees must:

(1) Provide funding through grants and contracts; and

(2)(i) Give highest priority to geographic areas within the area served by the Grantee that are eligible to receive grants under Section 1006 of the Elementary and Secondary Education Act of 1965; and

(ii) Then give priority to any other areas with concentrations of poverty, and any areas with very high or very low population densities.

(d) Early childhood development programs funded under this section:

(1) Must consist of services that are intended to provide an environment that enhances the educational, social, cultural, emotional, and recreational development of children; and

(2) Are not intended to serve as a substitute for compulsory academic programs.

(e) Before- and after-school programs funded under this section:

(1) Must be provided Monday through Friday, including school holidays and vacation periods other than legal public holidays, to children attending early childhood development programs, kindergarten, or elementary or secondary school classes during such times of the day and on such days that the regular instructional services are not in session; and

(2) Are not intended to extend or replace the regular academic program.

(f) Administrative costs associated with activities funded under paragraphs (a), (b)(1), and (b)(2) of this section are considered amounts expended for program activities in determining whether Grantees have met the requirements of those respective paragraphs.

(g) Pursuant to § 98.16(a)(8)(i), the Plan must specify the activities which the Grantee will fund under this section.

### § 98.52 Administrative activities.

(a) Block Grant funds may be used for administrative activities, as limited by § 98.50(d).

(b) As part of its annual Application, as provided in § 98.13(b), a Grantee must provide an estimate of total funds that will be used for administrative activities by both the Grantee and subgrantees during the program period. A list of all administrative activities on which the estimate is based must also be provided with the estimate. These activities may include, but are not limited, to:

(1) Salaries and related costs of the staff of the lead agency or other agencies engaged in the administration and implementation of the program pursuant to § 98.11. Program administration and implementation includes the following types of activities:

(i) Determining eligibility for child care services;

(ii) Planning, developing, and designing the Block Grant program;

(iii) Establishing and operating a certificate program;

(iv) Providing local officials and citizens with information about the program, including the conduct of public hearings;

(v) Preparing the Grantee's Application and Plan;

(vi) Developing systems, including automated information management systems;

(vii) Developing agreements with administering agencies in order to carry out program activities;

(viii) Monitoring program activities for compliance with program requirements;

(ix) Preparing reports and other documents related to the program for submission to the Secretary;

(x) Maintaining substantiated complaint files in accordance with the requirements of § 98.32;

(xi) Coordinating the provision of Block Grant services with other Federal, State, and local child care, early childhood development programs, and before- and after-school care programs;

(xii) Coordinating the resolution of audit and monitoring findings;

(xiii) Evaluating program results; and

(xiv) Managing or supervising persons with responsibilities described in paragraphs (b)(1)(i) through (xiii) of this section;

(2) Travel costs incurred for official business in carrying out the program;

(3) Administrative services, including such services as accounting services, performed by Grantees or subgrantees or under agreements with third parties;

(4) Audit services as required at § 98.65;

(5) Other costs for goods and services required for the administration of the program, including rental or purchase of equipment, utilities, and office supplies; and

(6) Indirect costs as determined by an indirect cost agreement.

(c) Expenditures on any administrative activities related to the services under § 98.50 are subject to the requirements under paragraph (d) of that section, and together with expenditures for quality and availability, must not exceed the limitation under § 98.50(d)(2).

### § 98.53 Supplementation.

(a) Grantees must provide assurances that funds received under the Block Grant will be used only to supplement, not supplant, the amount of Federal, State, and local funds otherwise expended for the support of child care services and related programs.

(b) The Grantee must determine the total amount of Federal, State, and local funds expended for such services during an initial base period (as defined in paragraph (b)(1) of this section) and during subsequent periods for child care services and related programs. The Grantee must assure that the amount of funding for such services from these other sources is maintained at least at the level of effort established for the base period.

(1) The base period will be a twelve-month period (e.g., the State fiscal year), which includes the month one year prior to the first month for which the Application is made. Subsequent periods are each twelve-month period following the preceding period. Grantees may establish:

(i) An aggregate base period level of effort, or;

(ii) Base periods and associated levels of effort on:

(A) A program-by-program basis;

(B) A level of government basis (e.g., Federal, State and local); or

(C) An alternative basis that provides for fiscal accountability.

(2) Should a Grantee choose to establish the base-period level of effort on a basis other than an aggregate basis, that basis will be reflected in the Plan, pursuant to § 98.16(a)(16).

(3) For purposes of this section, child care services and related programs are those services and programs which are included by the Grantee for funding under its Block Grant Plan.

(4) Amounts established for the base period will be included in the initial Application, amounts expended for subsequent periods will be included in subsequent annual Applications, pursuant to § 98.13.

(5) Reductions in Federal funding for programs included in the base period computation will be taken into consideration in determining whether a Grantee has met this requirement. Information regarding the nature, extent, and basis for the reduction must be included in the Grantee's Application, pursuant to § 98.13(a)(8)(iii).

### § 98.54 Restrictions on the use of funds.

(a) *General.* (1) Block Grant funds may not be expended for any activity not authorized in these regulations, or which does not meet the additional restrictions and limitations in paragraphs (b) through (d) of this section.

(2) Funds must be expended in accordance with applicable State and local laws, except as superseded by § 98.3.

(b) *Construction.* (1) For State and local agencies and non-sectarian agencies or organizations, no funds shall be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility. However, funds may be expended for minor remodeling, and for upgrading child care facilities to assure that providers meet State and local child care standards, including applicable health and safety requirements.

(2) For sectarian agencies or organizations, the prohibitions in paragraph (b)(1) of this section apply; however, funds may be expended for minor remodeling but only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to § 98.41.

(c) *Tuition.* Funds may not be expended for students enrolled in grades 1 through 12 for:

(1) Any service provided to such students during the regular school day;

(2) Any service for which such students receive academic credit toward graduation; or

(3) Any instructional services which supplant or duplicate the academic program of any public or private school.

(d) *Sectarian Purposes and Activities.* Funds provided under grants or contracts to providers may not be expended for any sectarian purpose or activity, including sectarian worship or instruction. Pursuant to § 98.2(j), assistance provided to parents through certificates is not a grant or contract. Funds provided through child care certificates may be expended for all such sectarian purposes and activities.

### § 98.55 Cost allocation.

(a) Grantees and subgrantees must prepare and keep on file State departmental level cost allocation plans or indirect cost proposals, as appropriate.

(b) Subgrantees that do not already have a negotiated indirect rate with the Federal government should prepare and keep on file cost allocation plans or indirect cost proposals, as appropriate.

(c) Approval of the cost allocation plans or indirect cost proposals, for the purposes of the Block Grant program, is not required, but these plans and proposals are subject to review.

## Subpart G—Financial Management

### § 98.60 Availability of funds.

(a) The Secretary will award Block Grant funds to States that have an approved Application and Plan, in accordance with the apportionment of funds from the Office of Management and Budget, and subject to the availability of appropriations.

(b) The Block Grant program does not require State or local match.

(c) The Secretary may make payments in installments, and in advance or by way of reimbursement, with necessary adjustments due to overpayments or underpayments.

(d) Grantees must obligate their allotment in the fiscal year in which funds are awarded or in the succeeding fiscal year. Unliquidated obligations as of the last day of the succeeding fiscal year must be expended within one year. Determination of whether funds have been obligated and expended will be based on State and local law. If there is no State or local law, Federal law (45 CFR 92.3, Obligations and Outlays (i.e., expenditures)) will apply.

(e) Cash advances to Grantees or by the Grantee to subgrantees or contractors shall be limited to the minimum amounts needed and shall be timed to be in accord with the actual, immediate cash requirements of the Grantee, subgrantee, or contractor in carrying out the purpose of the program in accordance with 31 CFR part 205.

(f)(1) Block Grant funds are available for obligation by the Grantee only after the grant award is issued unless:

(i) The costs are incurred for planning activities related to the submission of an initial Block Grant Application and Plan and

(ii) The planning activities occur after November 5, 1990.

(2) Federal obligation of funds for planning costs, pursuant to paragraph (f)(1) of this section, is subject to the actual availability of the appropriation.

(g) Funds that are returned to Grantees and subgrantees (e.g., loan repayments, unused subgrantee funds) as well as program income (e.g., contributions made by families directly to the Grantee or subgrantee for the cost of care where the Grantee or subgrantee has made a full payment to the provider) shall:

(1) If received by the Grantee or subgrantee during the program period, as defined in § 98.2(cc), for which the funds were allotted, be used for activities specified in the Grantee's approved Plan; or

(2) If received by the Grantee or subgrantee after the program period for which the funds were allotted:

(i) Be used for activities specified in the Grantee's approved Plan if State or local laws or procedures governing the use of the Grantee or subgrantee's own funds permit their re-use; or

(ii) Absent any State or local laws or procedures governing the use of such funds, be returned to the Federal government.

(h) Repayment of loans made by Grantees and subgrantees, pursuant to § 98.51(b)(2)(ii), may be made in cash or in services provided in-kind. Payment provided in-kind must be based on fair market value. All loans must be fully repaid.

### § 98.61 Allotments for States.

(a) An amount equal to the funds appropriated for the Block Grant, less amounts reserved for the Territories and Tribes, pursuant to § 98.62(a) and (b), shall be allotted to States. For purposes of this section and § 98.63, the term "State" means the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b) Funds will be allotted to States based upon the formula specified in section 6580(b) of the Act.

### § 98.62 Allotments for Territories and Tribes.

(a) An amount up to one-half of one percent of the amount appropriated for the Block Grant shall be reserved for the U.S. Territories of Guam, American Samoa, the Virgin Islands of the United States, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands (Palau).

(1) Funds shall be allotted to Territories based upon the following factors:

(i) A Young Child factor—the ratio of the number of children in the Territory under five years of age to the number of such children in all Territories; and

(ii) An Allotment Proportion factor—determined by dividing per capita income of all individuals in all the Territories by the per capita income of all individuals in the Territory.

(A) Per capita income shall be:

(*1*) Equal to the average of the annual per capita incomes for the most recent period of three consecutive years for which satisfactory data are available at the time such determination is made; and

(*2*) Determined every two years.

(B) Per capita income determined, pursuant to paragraph (a)(1)(ii)(A) of this section, will be applied in establishing the allotment for the fiscal year for which it is determined and for the following fiscal year.

(C) If the Allotment Proportion factor determined at paragraph (a)(1)(ii) of this section:

(*1*) Exceeds 1.2, then the Allotment Proportion factor of the Territory shall be considered to be 1.2; or

(*2*) Is less than 0.8, then the Allotment Proportion factor of the Territory shall be considered to be 0.8.

(*3*) The formula used in calculating a Territory's allotment is as follows:

$$\text{(i)}\quad \frac{YCF_t \times ADF_t}{\Sigma\,(YCF_t \times APF_t} \times \begin{array}{c}\text{amount reserved for}\\ \text{Territories at}\\ \text{paragraph (a) of}\\ \text{this section.}\end{array}$$

(ii) For purposes of the formula specified at paragraph (a)(2)(i) of this section, the term, "$YCF_t$," means the Territory's Young Child factor as defined at paragraph (a)(1)(i) of this section.

(iii) For purposes of the formula specified at paragraph (a)(2)(i) of this section, the term, "$APF_t$," means the Territory's Allotment Proportion factor as defined at (a)(1)(ii) of this section.

(b) An amount up to three percent of the amount appropriated for the Block Grant shall be reserved for Indian Tribes and Tribal organizations.

(1) Except as specified in paragraph (a)(2) of this section, grants to individual Tribal Grantees will be equal to the sum of:

(i) A base amount as set by the Secretary; and

(ii) An additional amount per Indian child under age 13 (or such similar age as determined by the Secretary from the best available data), which is determined by dividing the amount of funds available, less amounts set aside for eligible Tribes, pursuant to paragraph (b)(1)(i) of this section, by the number of all Indian children living on or near Tribal reservations or other appropriate area served by the Tribal Grantee, pursuant to § 98.80(e).

(2) Grants to Tribes with fewer than 50 Indian children which apply as part of a consortium, pursuant to § 98.80(b)(1), would be equal to the sum of:

(i) A portion of the base amount, pursuant to paragraph (b)(1)(i) of this section, that bears the same ratio as the number of Indian children in the Tribe living on or near the reservation, or other appropriate area served by the Tribal Grantee, pursuant to § 98.80(e), does to 50; and

(ii) An additional amount per Indian child, pursuant to paragraph (b)(1)(ii) of this section.

(3) Tribal consortia will receive grants that are equal to the sum of the individual grants of their members.

(c) At the Secretary's discretion, funds not allotted under this section will be distributed to other Grantees, or returned to the Federal government.

### § 98.63 Reallotment.

(a) Any portion of a State's allotment that is not required to carry out its Plan, in the period for which the allotment is made available, shall be reallotted to other State Grantees in proportion to the original allotments. For purposes of this section and § 98.61, the term "State" means the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico. Reallotment does not apply to Territorial or Tribal allotments, and Territorial and Tribal Grantees may not receive reallotted State funds.

(1) Each year, the State shall report to the Secretary either the dollar amount from the previous year's grant which it will be unable to obligate by the end of the obligation period or that all funds will be obligated during such time. Such report must be postmarked by April 1st.

(2) Based upon the reallotment reports submitted by States, the Secretary will reallot Block Grant funds.

(i) If the total amount available for reallotment is $25,000 or more, funds will be reallotted to States according to the State allotment formula for the applicable fiscal year's funds, pursuant to § 98.61(b).

(ii) If the amount available for reallotment is less than $25,000, the Secretary will not reallot any funds, and such funds will revert to the Federal government.

(iii) If an individual reallotment award to a State is less than $500, the Secretary will not issue the award, and such funds will revert to the Federal government.

(3) If a State does not submit a reallotment report by the deadline for report submittal, the Secretary will either:

(i) Determine that State does not have any funds available for reallotment; or

(ii) In the case of a report received after April 1st, any funds reported to be available for reallotment shall revert to the Federal government.

(b) The Secretary may withhold the amount of any reallotment to a State if the Secretary determines that such funds are not needed to carry out its Plan. Such funds will be distributed to the other States that are eligible for reallotted funds.

(c) States receiving reallotted funds must obligate and expend these funds in accordance with § 98.60. The reallotment of funds does not extend the obligation period or the program period for expenditure of such funds.

### § 98.64 Financial reporting.

(a) Beginning 90 days after the end of fiscal year 1992, and within 90 days after the end of each succeeding fiscal year, Grantees must submit to the Secretary a financial report for each fiscal year's grant.

(1) Except as provided in paragraph (a)(2) of this section, the report must include:

(i) The total amount of funds expended from the grant during the fiscal year; and

(ii) The total unliquidated obligations for the program period.

(2) After the end of a program period, the report must include final expenditures and the final balance of unliquidated obligations, if any.

(b) The Secretary reserves the right to require financial reports less frequently than specified in paragraph (a) of this section.

(c) If the Grantees or subgrantees earn program income, e.g., contributions made by families directly to the Grantee or subgrantee for the cost of care where the Grantee or subgrantee has made a full payment to the provider, pursuant to § 98.42(a), this income must be reported.

(d) Funds returned to Grantees or subgrantees, pursuant to § 98.60(g)(2), shall be reported as follows:

(1) If the funds are returned before the close of the period covered by the financial report, they should be included as a net adjustment to total expenditures in the report; or

(2) If the funds are returned after submission of the final financial report, they should be reported on a revised report for the same period and be included as a net adjustment to total expenditures.

### § 98.65 Audits.

(a) Each Grantee must have an audit conducted after the close of each program period in accordance with OMB Circular A–128.

(b) Grantees are responsible for ensuring that subgrantees are audited in accordance with appropriate audit requirements.

(c) Not later than 30 days after the completion of the audit, Grantees must submit a copy of their audit report to the legislature of the State or, if applicable, to the Tribal council(s). Grantees must also submit a copy of their audit report to the HHS Regional Inspector General for Audit Services responsible for the HHS region in which the Grantee is located, as well as their cognizant agency, if applicable.

(d) Any amounts determined through an audit not to have been expended in accordance with these statutory or regulatory provisions, or with the Plan, and which are subsequently disallowed by the Department shall be repaid to the Federal government, or the Secretary will offset such amounts against any other Block Grant funds to which the Grantee is or may be entitled.

(e) Grantees must provide access to appropriate books, documents, papers and records to allow the Secretary to verify that Block Grant funds have been expended in accordance with the statutory and regulatory requirements of the program, and with the Plan.

### § 98.66 Disallowance procedures.

(a) If the Agency, as the result of an audit or a financial or compliance review, finds that expenditures by a Grantee should be disallowed, the Agency will notify the Grantee of this decision in writing.

(b)(1) If the Grantee agrees with the finding that amounts were not expended in accordance with the Act, these regulations, or the Plan, the Grantee shall fulfill the provisions of the disallowance notice and repay any amounts improperly expended; or

(2) The Grantee may appeal the finding by informing the Assistant Secretary:

(i) Of the Grantee's intent to contest the decision and request reconsideration; or

(ii) By following the procedure in paragraph (c) of this section.

(c) A Grantee may appeal the disallowance decision to the Departmental Appeals Board in accordance with 45 CFR part 16.

(d) The Grantee may appeal a disallowance of costs that the Agency has determined to be unallowable under an award. This provision does not apply to the determination of award amounts or disposition of unobligated balances.

(e) The Grantee's request for reconsideration in paragraph (b)(2)(i) of this section must be postmarked no later than 30 days after the receipt of the disallowance notice. A Grantee may request an extension within the 30-day timeframe. The request for reconsideration, pursuant to paragraph (b)(2)(i) of this section, need not follow any prescribed form, but it shall contain:

(1) The amount of the disallowance;

(2) The Grantee's reasons for believing that the disallowance was improper; and

(3) A copy of the disallowance decision issued pursuant to paragraph (a) of this section.

(f)(1) Upon receipt of a request for reconsideration, pursuant to paragraph (b)(2)(i) of this section, the Assistant Secretary or the Assistant Secretary's designee will inform the Grantee that the request is under review.

(2) The Assistant Secretary or the designee will review any material submitted by the Grantee, and any other material necessary.

(3) If the reconsideration is adverse to the Grantee's position, the response will include notification of the Grantee's right to appeal to the Departmental Appeals Board, pursuant to paragraph (c) of this section.

(g) If a Grantee refuses to repay amounts after a final decision has been made, the amounts may be offset against future payments to the Grantee.

(h) The appeals process in this section is not applicable if the disallowance is the result of a compliance review, the findings of which have been appealed by the Grantee, pursuant to § 98.91(b).

(i) Disallowances under the Block Grant program are subject to interest regulations at 45 CFR part 30. Interest will begin to accrue from the date of notification.

### § 98.67 Fiscal requirements for contracts and agreements.

(a) Unless otherwise specified in this part, contracts which entail the expenditure of Block Grant funds shall comply with the laws and procedures generally applicable to expenditures by the contracting agency of its own funds.

(b) Fiscal control and accounting procedures must be sufficient to permit:

(1) Preparation of reports required under § 98.64 and under subpart H; and

(2) The tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the provisions of this part.

## Subpart H—Program Reporting Requirements

### § 98.70 Annual report requirement.

(a) Grantees that receive assistance under the Block Grant shall prepare and submit to the Secretary an annual report. The report will be submitted by December 31 and will cover the most recent program period which ended on September 30 of that year.

(b) The first such report shall be an interim report, covering expenditures through September 30, 1992, and shall be submitted no later than December 31, 1992.

(c) Annual reports to the Secretary shall include the information listed in § 98.71.

### § 98.71 Content of report.

At a minimum, a Grantee's report to the Secretary, as required in § 98.70, shall:

(a)(1) Specify the uses for which the Grantee expended funds under §§ 98.50 through 98.52 and the amount of funds expended for such uses (with reference to the uses specified in the Grantee's Application, pursuant to § 98.13(a)(6)); and

(2) For the first two years of the Grantee's operation of the program, if expenditure amounts reported are not in compliance with the requirements at § 98.50(d)(2), provide an explanation and rationale for any expenditures allowable under § 98.50(d)(3).

(b) To the extent data are reasonably available, contain available data on the manner in which the child care needs of families in the area served by the Grantee are being fulfilled, including information concerning:

(1) The number of children being assisted with funds provided under the Block Grant, and under other Federal child care and pre-school programs;

(2) The type and number of child care programs, child care providers, caregivers, and support personnel located in the area served by the Grantee;

(3) Salaries and other compensation paid to full- and part-time staff who provide child care services; and

(4) Activities to encourage public-private partnerships that promote business involvement in meeting child care needs;

(c) Describe the extent to which the affordability and availability of child care services has increased;

(d) If applicable, describe, in either the first or second annual report, the findings of the Grantee's review of its licensing and regulatory requirements and policies, pursuant to § 98.41(d), including a description of actions taken by the Grantee in response to such reviews;

(e) Contain, if applicable, an explanation of any Grantee action which reduces the level of child care standards, as required in § 98.41(c);

(f) Describe the standards and health and safety requirements applicable to child care providers in the State or other area served by the Grantee, including a description of Grantee efforts to improve the quality of child care; and

(g) Any additional information that the Secretary shall require.

## Subpart I—Indian Tribes

### § 98.80 General procedures and requirements.

An Indian Tribe or Tribal organization (as defined at §§ 98.2(u) and 98.2(oo)) may be awarded grants to plan and carry out programs for the purpose of increasing the availability, affordability, and quality of child care and childhood development programs subject to the following conditions:

(a) An Indian Tribe applying for or receiving Block Grant funds shall be subject to all the requirements under this part, unless otherwise indicated in this subpart.

(b) An Indian Tribe applying for or receiving Block Grant funds must:

(1) Have at least 50 children under the age of 13 (or such similar age, as determined by the Secretary from the best available data) in order to be eligible to operate a Block Grant program. This does not preclude an Indian Tribe with fewer than 50 children age 13 years or younger from participating in a consortium which receives Block Grant funds; and

(2) Demonstrate that it has the ability (including skills, personnel, resources, community support, and other necessary components) to satisfactorily carry out the program.

(c) A consortium representing more than one Indian Tribe may be eligible to receive Block Grant funds on behalf of a particular Tribe if:

(1) The consortium obtains and submits a resolution from each participating Tribe authorizing the consortium to receive Block Grant funds on behalf of each Tribe or Tribal organization in the consortium; and

(2) The consortium consists of Tribes which each meet the eligibility requirements for the Block Grant program as defined in this part, or which would otherwise meet the eligibility requirements if the Tribe or Tribal organization had at least 50 children age 13 or younger; and

(3) All the participating consortium members are in geographic proximity to one another (including operation in a multi-State area) or have an existing consortium arrangement; and

(4) The consortium demonstrates that it has the managerial, technical and administrative staff with the ability to properly administer government funds, manage a Block Grant program and comply with the provisions of the Act and of this part.

(d) The awarding of a grant under this section shall not affect the eligibility of any Indian child to receive Block Grant services provided by the State or States in which the Indian Tribe is located.

(e) For purposes of the Block Grant, the determination of the number of children in the Tribe, pursuant to paragraph (b)(1) of this section, will include Indian children living on or near reservations, with the exception of Tribes in Alaska, California and Oklahoma.

(f) In determining eligibility for services pursuant to § 98.50(a)(1), a Tribal program may use either:

(1) 75 percent of the State median income for a family of the same size; or

(2) 75 percent of the median income for a family of the same size residing in the area served by the Tribal Grantee.

### § 98.81 Application and Plan.

(a) In order to receive Block Grant funds, Indian Tribes (as defined at § 98.2) must submit an Application (as defined at § 98.13) which provides that:

(1) The applicant will coordinate, to the maximum extent feasible, with the lead agency(ies) in the State(s) in which the applicant will carry out Block Grant programs or activities; and

(2) In the case of an applicant located in a State other than Alaska, California, or Oklahoma, Block Grant programs and activities will be carried out on an Indian reservation for the benefit of Indian children.

(b) The initial Application under paragraph (a) of this section must include a Plan which meets the provisions of this part, and shall be for a two-year period, pursuant to § 98.17(b).

### § 98.82 Coordination.

Tribal applicants will coordinate:

(a) To the maximum extent feasible, with the lead agency in the State or States in which the applicant will carry out the Block Grant program; and

(b) With other Federal, State, local, and Tribal child care and childhood development programs.

### § 98.83 Requirements for Tribal programs.

(a) The Grantee must designate an agency, department, or unit to act as the lead agency to administer the Block Grant program.

(b) With the exception of Alaska, California, and Oklahoma, programs and activities must be carried out on an Indian reservation for the benefit of Indian children.

(c) In the case of a Tribal Grantee which is a consortium, variations in Block Grant programs or requirements and in child care licensing, regulatory and health and safety requirements must be specified in written agreements between the consortium and the Tribe.

## Subpart J—Monitoring, Non-compliance and Complaints

### § 98.90 Monitoring.

(a) The Secretary will monitor programs funded under the Block Grant for compliance with:

(1) The Act;

(2) The provisions of this part; and

(3) The provisions and requirements set forth in the Block Grant Plan approved under § 98.16;

(b) If a review or investigation reveals evidence that the Grantee, or an entity providing services under contract or agreement with the Grantee, has failed to substantially comply with the Plan or with one or more provisions of the Act or implementing regulations, the Secretary will issue a preliminary notice to the Grantee of the possible non-compliance. Any comments received from the Grantee within 60 days (or such longer period as may be agreed upon between the Grantee and Department) shall be considered by the Department.

(c) Pursuant to an investigation conducted under paragraph (a) of this section, a Grantee shall make appropriate books, documents, papers, manuals, instructions, and records available to the Secretary, or any duly authorized representatives, for examination or copying on or off the premises of the appropriate entity, including subgrantees and contractors, upon reasonable request.

### § 98.91 Non-compliance.

(a) If after reasonable notice to a Grantee, pursuant to §§ 98.90 or 98.93, a final determination is made that:

(1) There has been a failure by the Grantee, or by an entity providing services under contract or agreement with the Grantee, to comply substantially with any provision or requirement set forth in the Plan approved under § 98.16; or

(2) If in the operation of any program for which funding is provided under the Block Grant, there is a failure by the Grantee, or by an entity providing services under contract or agreement with the Grantee, to comply substantially with any provision of the Act or this part, the Secretary will provide to the Grantee a written notice of a finding of non-compliance. This notice will be issued within 60 days of the preliminary notification in § 98.90(b), or within 60 days of the receipt of additional comments from the Grantee, whichever is later, and will provide the opportunity for a hearing, pursuant to part 99.

(b) The notice in paragraph (a) of this section will include all relevant findings, as well as any penalties or sanctions to be applied, pursuant to § 98.92.

(c) Issues subject to review at the hearing include the finding of non-compliance, as well as any penalties or sanctions to be imposed pursuant to § 98.92.

### § 98.92 Penalties and sanctions.

(a) Upon a final determination that the Grantee has failed to substantially comply with the Act, the implementing regulations, or the Plan, one of the following penalties will be applied:

(1) No further payments under the Block Grant will be made to such Grantee; or,

(2) In the case of noncompliance in the operation of a program or activity, no further payments to the Grantee will be made with respect to such program or activity.

(b) The penalty provided under paragraph (a) of this section will continue until the Secretary is satisfied that there is no longer any such failure to comply or that the noncompliance will be promptly corrected.

(c) In addition to imposing the penalties described in paragraph (a) of this section, the Secretary may impose other appropriate sanctions, including recoupment of money improperly expended for purposes prohibited or not authorized by the Act or the implementing regulations, and disqualification of the Grantee from the receipt of further funding under the Block Grant.

(d) If a Grantee is subject to additional sanctions as provided under paragraph (c) of this section, specific identification of any additional sanctions being imposed will be provided in the notice provided pursuant to § 98.91.

(e) Nothing in this section, or in §§ 98.90 or 98.91 will preclude the Grantee and the Department from informally resolving a possible compliance issue without following all of the steps described in §§ 98.90, 98.91 and 98.92. Penalties and/or sanctions, as described in paragraphs (a) and (c) of this section, may nevertheless be applied, even though the issue is resolved informally.

### § 98.93 Complaints.

(a) This section applies to any complaint (other than a complaint alleging violation of the nondiscrimination provisions) that a Grantee has failed to use its allotment in accordance with the terms of the Act, the implementing regulations, or the Plan. The Secretary is not required to consider a complaint unless it is submitted as required by this section. Complaints with respect to discrimination should be referred to the Office of Civil Rights of the Department.

(b) Complaints with respect to the Block Grant must be submitted in writing to the Assistant Secretary for Children and Families, 370 L'Enfant Promenade, SW., Washington, DC 20447. The complaint must identify the provision of the Plan, the Act, or this part that was allegedly violated; must specify the basis for alleging the violation(s); and must include all relevant information known to the person submitting it.

(c) The Department shall promptly furnish a copy of any complaint to the affected Grantee. Any comments received from the Grantee within 60 days (or such longer period as may be agreed upon between the Grantee and Department) shall be considered by the Department in responding to the complaint. The Department will conduct an investigation of complaints, where appropriate.

(d) The Department will provide a written response to complaints within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary.

(e) Complaints which are not satisfactorily resolved through communication with the Grantee will be pursued through the process described in § 98.90.

# CONFERENCE REPORT PROVISIONS (HOUSE REPORT 101-964)

## Title IV-A At-Risk Child Care Program

*Present law*

Federal matching is available to States on an entitlement basis to provide child care for AFDC parents who are participating in the JOBS program, and to provide child care for a period of 12 months after the family loses eligibility for AFDC as a result of increased hours of, or increased income from, employment.

*House bill*

No provision.

*Senate amendment (Section 6043 of Senate amendment)*

Funding for the existing title IV child care program would be increased to provide $65 million for each of fiscal years 1991–1995 to enable States to provide child care to low income non-AFDC families that the State determines: (1) need such care in order to work; and (2) would otherwise be at risk of becoming dependent upon AFDC.

Capped entitlement funds would be allocated on the basis of child population. Rules relating to Federal matching rates, reimbursement, standards, and fee schedules would remain the same as in current law. States would be required to report annually to the Secretary on child care activities carried out with funds under this entitlement.

In addition, the authorization for grants (enacted in the Family Support Act of 1988) to enable States to improve their child care licensing and registration requirements and procedures, and to monitor child care provided to children receiving AFDC, would be extended to provide $35 million for each of fiscal years 1992, 1993, and 1994 for these purposes.

*Conference agreement*

The conference agreement follows the Senate amendment, modified to provide $300 million for each of fiscal years 1991 through 1995. In addition, the conference agreement provides that all child care providers that receive funds under this provision must be licensed, regulated, or registered. As in the Senate amendment, all child care paid for with these funds must meet applicable standards of State and local law. However, there would be no requirement that individuals who provide care solely to members of their family be licensed, regulated, or registered.

It is the intent of the conferees that States will have maximum flexibility in determining how these new grant funds are used.

The $35 million currently authorized for grants to improve licensing and registration requirements and procedures, and to monitor child care provided to children of AFDC recipients, is increased to $50 million, beginning in fiscal year 1992 and extending through fiscal year 1994. One-half of these funds are earmarked for training child care providers. The remainder must be used for improving licensing and registration requirements and procedures, and for enforcement. Activities under the grant would apply to all children receiving services under title IV-A, not just those receiving AFDC.

# Child Care and Development Block Grant Program

The Conference report includes the Child Care and Development Block Grant Act of 1990. The purpose of this block grant program is to increase the availability, affordability, and quality of child care. The provision provides financial assistance to low-income, working families to help them find and afford quality child care services for their children. It also contains provisions to enhance the quality and increase the supply of child care available to all parents, including those who receive no financial assistance under the block grant program.

More specifically, the purpose of this block grant program is to give parents a variety of options in addressing family child care needs. Additionally, this provision is intended to build on and to strengthen the role of the family by seeking to ensure that parents are not forced by the lack of available programs or financial resources to place a child in an unsafe or unhealthy child care arrangement; to promote the availability and diversity of quality child care services to expand child care options available to all families who need such services; to provide assistance to families whose financial resources are not sufficient to enable such families to pay the full cost of necessary child care; to improve the productivity of parents in the labor force by lessening the stresses related to the absence of adequate child care services; and to provide assistance to states and Indian tribes to improve the quality of, and coordination among, child care programs and early childhood development programs.

The Conference agreement authorizes $750,000,000 for fiscal year 1991, $825,000,000 for fiscal year 1992, $925,000,000 for fiscal year 1993, and such sums as may be necessary for fiscal years 1994 and 1995. Block grant funds are provided to states in accordance with a formula based on numbers of young children and of school lunch recipients.

### *Use of block grant funds for child care services*

Each state shall use 75 percent of block grant funds for direct assistance to parents for child care services and to increase the supply and to improve the quality of child care. Block grant funds may only be used by the states for child care services and for activities which directly improve the availability and quality of care for families assisted under the Act. Quality activities eligible for funds under section 658E(c)(3)(B)(ii) should be the same type of quality activities specified in the quality reservation in section 658G. It is the conferees' intent that a preponderance of the block grant funds be spent specifically on child care services and a minimum amount on other authorized activities.

The managers believe that parents should have the greatest choice possible in selecting child care for their children. Thus, parents assisted under section 658(c)(3)(B) would have complete discretion to choose from a wide range of child care arrangements, including care by relatives, churches, synagogues, family providers, centers, schools, and employers. All such providers may be paid through grants or contracts or through certificates provided to the parent. A parent assisted under section 658E(c)(3)(B) must be given the option of receiving a certificate.

### *Use of 25 percent reserve of funds*

Each state shall reserve 25 percent of block grant funds for grants and contracts to providers of early childhood development or before- and after-school services, or both, and for activities to improve the quality of child care. Of the 25 percent reserve, not less than seventy-five percent of this reserve shall be allocated to early childhood development and before- and after-school care activities; not less than twenty percent for quality activities with the remaining five percent to be used for either purpose. A state may assign responsibility for the administration of early childhood development and latchkey programs to an agency other than the lead agency, such as an agency that has experience in the administration of existing education or preschool programs. Eligible quality activities include establishing or expanding resource and referral programs; making grants or loans to providers to assist them in meeting state and local child care standards; improving the monitoring of compliance with, and enforcement of, state standards and licensing and regulatory requirements; providing training and technical assistance; and improving salaries and other compensation paid to child care staff.

### *General provisions*

Families eligible for assistance for child care are those who earn less than 75 percent of the state median income and who have children under age 13. The amount of assistance would be based on a sliding fee scale established by the state. Nothing in this subchapter is intended to prohibit the provision of services at no cost to families whose income is at or below the poverty level. Providers would receive payment at rates which would ensure equal access to services comparable to those provided to children whose care is not publicly subsidized.

Parental choice and involvement are further enhanced through provisions for unlimited parental access to children during the day and within the care setting, for parental complaint procedures and access to records of substantiated parental complaints, and for consumer education.

The managers intend that the determination whether any financial assistance provided under this subchapter, including a loan, grant or child care certificate, constitutes Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), the Rehabilitation Act of 1973 (29 U.S.C. 794 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), all as amended, and the regulations issued thereunder, shall be made in accordance with those provisions. bb

To receive funds, a state shall submit a plan that includes: designation of a lead agency; local consultation regarding development of the plan; coordination with existing programs; use of funds for child care services, including early childhood education and before-and-after school care, and for activities related to quality and availability; supplement not supplant language; priority for very low income children and children with special needs; and use of a sliding fee scale. The managers intend that, to the maximum extent practicable, the lead agency be a state entity in existence on or before the date of enactment of this subchapter with experience in the administration of appropriate child care programs.

All eligible providers shall be licensed, regulated, or registered prior to payment and must comply with applicable state and local licensing and regulatory requirements. The state plan shall describe minimum health and safety requirements established by the state for all providers funded under this subchapter and ensure that such providers demonstrate compliance with these requirements. These health and safety requirements include the prevention and control of infectious diseases, building and physical premises safety, and a minimum health and safety training requirement appropriate to the provider setting. The state shall conduct a one-time review of state licensing and regulatory requirements and policies, unless the state has done so within three years prior to the date of enactment.

The state shall report to the Secretary of Health and Human Services annually on the use of funds under this subchapter; data on caregivers and children in care; activities to encourage public-private partnerships which promote business involvement in meeting child care needs; results of any review of state licensing and regulatory requirements; a rationale for any state actions to reduce the levels of state standards; state actions to improve the quality of care; and a description of standards in the state.

The Secretary will report to Congress annually on use of all Child Care and Development Block Grant Act funds in the states. The report will include a summary and analysis of the above data provided by the States to the Secretary and any recommendations to Congress on further steps necessary to improve access to quality and affordable child care.

# SELECTED COMMENTS RECEIVED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REGARDING ITS IMPLEMENTING REGULATIONS FOR NEW CHILD CARE PROGRAMS

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(VACANCY)

TELEPHONES
MAJORITY—(202) 225-4527
(TTY)—(202) 226-4044
MINORITY—(202) 225-3725
(TTY)—(202) 226-3727

August 1, 1991

The Honorable Louis W. Sullivan
Secretary of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C.  20201

Dear Secretary Sullivan:

We are writing to express grave concerns over the interim final regulations issued on June 6th for the Child Care and Development Block Grant. Our comments on the regulations are limited to the 5 areas which we believe most egregiously deviate from the statute and from Congressional intent. Our comments concern the regulatory language as well as the preamble, since in many instances it is the preamble's detailed guidance in highlighting and explaining issues which we find objectionable. (*Wiggins Bros., Inc.* v. *Department of Energy*, 667 F.2d 77 (1981) found that in the construction of the Constitution of the United States, statutes and regulations, federal rule permits and requires consideration of preambles in appropriate cases.)

1. Competing principles of federalism and parental choice.

First and foremost, the preamble establishes incorrectly that the law contains competing principles of federalism and of parental choice. The Department takes the position it must arbitrate these conflicting concerns.

The primary areas in question concern state and local regulatory requirements (Section 98.40), health and safety requirements (Section 98.41), payment rates (Section 98.43) and registration requirements (Section 98.45). "In each of these areas", the Department states in its preamble, "excessive and ill-designed requirements or procedures could prejudice parental choice" and would therefore not be acceptable. Moreover, the rules countenance, "Block Grant funds will not be available to a Grantee if State or local rules, procedures or other requirements promulgated for purposes of the Block Grant significantly restrict parental choice" (Section 98.30 (g)). For example, "Grantees may not set health and safety standards and requirements...that are inconsistent with the parental choice safeguards" (Section 98.41(b)). We are alarmed not only by this general premise, but by the specific guidance to states. One particularly disturbing example that was brought to our attention concerned federal officials warning state officials that a criminal record check on providers subsidized by this program could indeed jeopardize their funding.

In our view, your stated premise that parental choice and federalism are competing principles under this statute is a faulty reading of the law. While a balance must be struck, the notion that the statute's common sense principles are incompatible with parental choice is misguided.

The statute requires block grant recipients to conform to state and local child care standards and requires states to have minimum health and safety standards in effect. These statutory requirements offer a measure of safety for children when they are under the publicly-funded care of someone other than a family member. Safeguards of this sort are not intended to be onerous to providers, or, more importantly, to eliminate choice for parents. They are intended to help protect the public's and the family's interest, much like safeguards in the food industry protect the public against food-borne diseases.

The statute also provides for parental choice, giving parents "the option either -- (I) to enroll such child with a child care provider that has a grant or contract for the provision of such services; or (II) to receive a child care certificate..." This section does not imply that parents' choice is unlimited or that, however desirable, parents will necessarily have a wide range of options that simply do not exist. In a straightforward fashion, it merely provides parents with the choice of several financial arrangements -- and therefore types -- of child care.

We fully expect that regulations will eliminate child care providers who have not met a State's standards. It does not logically follow, however, that choice will have been compromised in the process, except for choice among "bad" providers. The elimination of child care that is unsafe or of dubious quality affirms choice by limiting the parental selection to just that care which is reasonably safe.

As a final point, we believe the preamble and relevant sections of the regulations take an unwarranted position against states' regulating their child care. Most states have moderate or very lax standards for child care. The Department assumes the reverse, however, and then proceeds to warn states against overregulation.

We request that the Department make substantial revisions in both the preamble and in the pertinent sections of the regulations to more accurately reflect the law and to clarify that choice and strong standards can coexist. The statute is eminently clear in favoring strong standards. The statute provides, "This subparagraph shall not be construed to prohibit a State from imposing more stringent standards and licensing or regulatory requirements on child care providers." (Section 658(c)(2)(E)). It then mandates that States establish health and safety requirements. And finally, it admonishes states to, "inform the Secretary of the rationale for such reduction" of standards should that occur. These provisions illustrate an unequivocal commitment to upholding or increasing state standards. By contrast, the Department has developed an extraordinarily whimsical approach which effectively discourages states from holding high standards in the guise of protecting parental choice.

2. Non-Discrimination.

Section 658N(a)(2)(A) of the Statute provides, "A child care provider (other than a family child care provider) that receives assistance under this subchapter shall not discriminate against any child on the basis of religion in providing child care." Sec. 658N(a)(3) extends this prohibition on discrimination to employment in a child care setting.

The regulations extend the non-discrimination requirements to child care providers that receive assistance through grants or contracts. However, they specifically exempt child care providers that receive assistance through certificates.

This interpretation is wholly inconsistent with the law. The law is clear that the non-discrimination section applies to all providers receiving assistance under the act, with one exception. That exception, family child care, is the only provider specifically excluded from this requirement. Had we intended to also exclude certificates from this requirement, we would have done so explicitly. The practical effect of exempting certificates from religious non-discrimination provisions would be to allow federal funds to subsidize discrimination against children and child care staff based on their religious beliefs. For further direction on this issue, we refer you to item five which follows. We respectfully ask that this language be changed to comport with the statute.

3. Availability of certificates year-round.

The preamble to the regulations states, "a child care certificate program must ensure that parents may obtain certificates throughout the program year..."

We believe this sends an incorrect message to states. States are mandated by statute to provide grants/contracts and certificates for child care. How will states be able to conform to this "parental choice" mandate if the rules requires certificates, and only certificates, to be available year-round? Why does the rule not provide for grants, contracts and certificates to be available year-round? Short of this, how can a state be reasonably expected to establish child care options as mandated by law if they are instructed to hold an unlimited amount of cash in reserve at all times for certificates? We suggest that this provision be deleted as it would create a conflict by establishing a presumption for one financial arrangement over others which were mandated by the statute.

4. Payment rates.

The regulations accurately reflect statutory language on assuring "equal access for eligible children to comparable child care services" through payment rates. However, the accompanying guidance provided in the preamble vitiates this statutory protection which allows reimbursement for high quality child care.

The preamble limits the differing payment rates to categories of care, rather than allowing differing reimbursements within a single category of care. The preamble provides that "grantees must differentiate between center-based, group home, family, and in-home care providers....and that providers must be reimbursed at the same rate as other providers in the same category". Generally, quality costs more. A group-home with a low child-staff ratio and a generous number of square feet per child may be more expensive than other group-homes. This difference should be accommodated for in the rates of reimbursement. Your guidance does not allow for this. Moreover, we have heard that some states are concerned about the effect of your guidance on group-homes in their States, where some, but not all, group-homes are regulated. These States argue that they would expect to reimburse the regulated care at a higher rate, but according to your guidance would be prohibited from doing so.

The statute stresses "equal access for comparable care". Comparable care does not in any way imply a single level of care within each category. By extending that reasoning, all children served under this program could be relegated to the least expensive child care of the community, thus segregating these children from those whose parents can afford to pay more. A resulting two-tiered system of child care is precisely what the statutory language was intended to prevent.

5. Legislative history.

The preamble states, "the bills which individually passed the House (H.R. 3) and the Senate (S. 5) were not the basis for crafting the compromise....As a result, there is relatively little legislative history that is instructive in drafting regulations that reflect the clear intent of the law."

We disagree with this conclusion. The final child care bill was a compromise vehicle, crafted in the final days of the 101st Congress to salvage some acceptable form of child care legislation. Several Senators who negotiated the terms of the final bill with the Administration were also conferees on S. 5 and had been key players in the extensive Committee and floor debates on this bill. In order to come up with a "solution" that would be acceptable to the House of Representatives, to the Senate and to the White House, the drafters certainly had to consider the child care bills under active consideration. In fact, Section 658N of the Child Care and Development Block Grant incorporates word-for-word the compromise language of S. 5 concerning religious non-discrimination. We therefore believe

S. 5 and H.R. 3 may offer general guidance on the Child Care Block Grant, with specific guidance on the relevant sections such as the non-discrimination language cited above.

We would be happy to discuss with you any of these concerns should you have questions or desire further clarification.

With kind regards,

Sincerely,

William D. Ford
WILLIAM D. FORD
Chairman
Committee on Education & Labor

Matthew G. Martinez
MATTHEW G. MARTINEZ
Chairman
Subcommittee on Human Resources

cc: Assistant Secretary for Children and Families
Attn: Mark Ragan
Child Care Task Force
Fifth floor, 370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

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United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

August 2, 1991

Ms. Jo Anne B. Barnhart
Assistant Secretary for
Children and Families
Department of Health and Human Services
Fifth Floor
370 L'Enfant Promenade, SW
Washington, DC 20447
Attention: Mark Ragan

Dear Assistant Secretary Barnhart:

We are writing to comment on the interim final rule for the Child Care and Development Block Grant ("Block Grant") promulgated in the Federal Register on June 6, 1991.

As you know, we were directly and intensively involved with this legislation throughout the 100th and 101st Congresses, from the earliest conceptual stages to the final discussions with House conferees and Administration representatives regarding the Conference report eventually enacted and signed into law. We take pride in the final product and believe that American families will benefit greatly from the infusion of new Federal child care funds and from the emphasis on improving the quality and availability of child care services in their communities.

We have reviewed the proposed regulations, taking into account the legislative history and Congressional intent and comments that we have received from our states and from individuals and organizations involved with implementation of the block grant. In general, we believe that the Department has accurately reflected the provisions of the Block Grant statute in the proposed text of the regulations which begins on page 26224 of the Federal Register. In certain areas where the statutory text is general and calls for more detailed interpretation, we commend the Department for spelling out guidelines that will help to improve child care services--for example, the broader age eligibility for children with special needs.

In a number of areas, however, we find that the proposed preamble and text are inconsistent with the statute and with legislative history. Rather than submitting a lengthy list of comments, we will focus on several key issues for which modifications in the regulations are clearly warranted.

First, we ask that you revise the definition of "preponderance" regarding the use of the 75 percent of Block

Grant funds reserved for child care services. The proposed rule interprets "preponderance" as requiring that at least 90 percent of the funds be expended for services (85 percent in the first two years) and that no more than 10 percent be expended for activities to improve the availability and quality of child care and all other non-service expenditures. The text of the statute states that a state shall use the 75 percent for:

> "(i) child care services, that meet the requirements of this subchapter, that are provided to eligible children in the State on a sliding fee scale basis using funding methods provided for in section 658E(c)(2)(A), with priority being given for services provided to children of families with very low family incomes (taking into consideration family size) and to children with special needs; and
>
> (ii) activities designed to improve the availability and quality of child care." [Section 658E(c)(3)(B)]

According to the statement of managers, "[i]t is the conferees' intent that a preponderance of the block grant funds be spent specifically on child care services and a minimum amount on other authorized activities".

Certainly, the managers' use of the term "preponderance" conveys strong Congressional intent that the majority of Section 658E(c)(3)(B) funds be used for child care services. However, nothing in the legislative history of the statute suggests a set-aside as high as 90 percent. To the contrary, the final statutory language for Section 658E(c)(3)(B) was designed to give states maximum flexibility to allocate these funds for a variety of activities based on the needs of individual states. Thus, we would urge that you consider modifying this portion of the regulations to require at least 70 percent of Section 658E(c)(3)(B) funds be used for services, with no more than 10 percent of the remaining funds to be used for administrative costs.

This revision would better reflect Congressional intent and would provide states with greater flexibility. Indeed, we have learned that a number of states would have preferred to spend a greater proportion of their Section 658E(c)(3)(B) allotment to enhance quality and availability, but found their goals precluded by this provision. Because some states historically have focused state funds on payment for the cost of care, at this juncture they seek the opportunity to use a greater proportion of Block Grant funds for improvements in other areas also encompassed by the legislation. It is our understanding that for many states, ongoing administrative costs for the certificate program alone will reach up to 15 percent. Thus, unless they are given greater flexibility, virtually none of the funds under this portion of the block grant will be used to improve availability and quality, thus nullifying our intent.

Second, we are deeply concerned that the Department's interpretation of the statute's "parental choice" provisions may preclude states from complying with statutory requirements concerning minimum health and safety standards, payment rates, and registration of providers. Section 98.30(g) of the regulations effectively prohibits states from applying health and safety or other requirements that have the "effect of limiting parental access to or choice" from among categories of care or "excluding a significant number of providers in any category of care or of any type".

Certainly one of our broad goals as sponsors of the statute was to enact legislation that would enhance parental choice in selecting appropriate child care arrangements for their children. Equally clear was our strong commitment to ensure that child care services funded by this program meet minimum health and safety standards set by the states. Thus, the statute explicitly states that all providers receiving funds (except grandparents, aunts, and uncles) must meet minimum health and safety standards in certain categories specified by the statute.

Nothing in the statute--or in the legislative history--suggests that the requirement for minimum health and safety standards is conditioned on some threshold of parental choice. To the contrary, the statute and legislative history convey an absolute and unconditional requirement that states establish minimum standards for providers receiving Block Grant funds. Parents then should have the option to select a provider from among those who meet these minimum state standards.

By definition, minimum health and safety standards provide a floor of protection for children below which the care setting simply is not safe. Thus, it would be a disservice to parents--and contrary to the concept of state flexibility which is basic to the Act--to effectively require states to fund care which state governments have determined is unsafe. We urge the Department to modify the regulations by deleting Section 98.30(g).

Third, the regulations misconstrue the nondiscrimination provisions of Section 658N of the statute. Sections 98.46 and 98.47 of the regulations state that the statutory provisions barring discrimination on the basis of religion in admissions and in employment apply only to child care providers that receive assistance through grants and/or contracts. This interpretation contravenes statutory language which applies these nondiscrimination provisions to all child care providers (other than a family child care provider) that receive assistance under the Block Grant. This is in contrast to the Section 658M limitations on the use of Block Grant funds for sectarian purposes, which apply only to assistance provided through grants or contracts.

The legislative history on these two sections is extremely clear. Both S.5 and H.R. 2 were passed with language virtually identical to these sections; very little modification occurred in Conference. The S.5 nondiscrimination provisions were carefully drafted so that religious providers could utilize preferential admissions and employment policies sufficient to accommodate their needs. Throughout the legislative history, from introduction through enactment, the nondiscrimination provisions covered all forms of assistance. By contrast, the provisions limiting use of funds for sectarian purposes initially covered all forms of assistance, but were modified during Senate floor consideration to exempt providers funded through certificates. We urge the Department to revise Sections 98.46 and 98.47 to state that all providers receiving assistance under the Block Grant, including assistance in the form of certificates, are subject to the nondiscrimination provisions.

Fourth, we ask that certain operational provisions be clarified and adjusted. Section 98.30(a)(3) of the proposed rule contains a requirement that the choice of a certificate be available anytime that child care services are available under the 75 percent allocation. This is an interpretation of the statutory requirement in Section 658E(c)(2)(A)(i) that parents be given the option either "to enroll such child with a child care provider that has a grant or contract for the provision of such services or to receive a child care certificate".

We agree that states should not adopt policies which unduly restrict the availability of certificate funds. But the regulatory requirement that certificates be available "anytime" will impel states to limit their use of contracts out of concern that certificate funds will otherwise be exhausted. A state may operate a successful certificate program (as well as a grant/contract program) but only have funds sufficient to pay for certificates during part of the year. Such a state should not be required either to shut down other grant-funded services once the certificate funds are exhausted or to artificially stretch certificate funds out over the entire year. In addition, providers paid through grants and contracts often serve children from low-income families, or with special needs, or who live in rural areas. The intent of the statute is to support such programs and thus to expand families' access to a full range of care. Without the predictability of grant/contract funding, these critically important programs are in jeopardy. The regulations should be clarified to permit a state to allocate portions of funds for grant/contract services, as long as their overall system provides parents with a choice of certificates or grants/contracts.

The modifications that we suggest would provide greater flexibility for states in determining how best to meet families' child care needs. Many states wish to improve the quality of child care options for children and families, but the regulations as currently drafted restrict their ability to do so. Were these restrictions reflective of the language of the statute and of our Congressional intent, we would have no argument. Because the proposed rule works well in so many ways, we hope that the Administration will look favorably on our comments and revise the regulations accordingly.

Thank you for your consideration of these comments.

Sincerely,

Chris Dodd
CHRISTOPHER J. DODD
United States Senator

Orrin Hatch
ORRIN G. HATCH
United States Senator

Edward M Kennedy
EDWARD M. KENNEDY
United States Senator

DANIEL P. MOYNIHAN
NEW YORK

United States Senate
WASHINGTON, DC 20510

August 26, 1991

Dear Ms. Barnhart:

I write to express my strong support for the day care rules recently promulgated by the Administration for Children and Families. These rules would safeguard the right of welfare families to make their own decisions about day care without excessive government interference.

If we are to help poor people escape welfare dependency, we must make it possible for them to find the services they need. In practice, this means permitting choices for services like day care, and assuring access to them.

Welfare mothers have varied day care needs. They may want to take night courses at a vocational school, or work at a part-time job. They may change activities several times as they struggle to find the best avenue out of poverty. Sometimes these needs can be met by a licensed day care center; other times they are best met by a neighbor or a friend. In that respect, they are like the rest of us. It follows that they should have the same opportunities available to the rest of us.

The issue is not whether we regulate day care. All of us agree that minimum day care standards are needed. Rather the issue is whether publicly-funded day care -- the day care available to poor families -- should be held to a higher standard than all other day care. Those who take this position in effect are saying that society cannot trust the poor to decide what is best for their children. So at the very time we are trying to convince welfare recipients to take control of their lives and start down the road to financial independence, others would have us tell them that we do not trust them to look after their own children. There is in all this a considerable irony.

In any event, I reject that view. I believe most poor mothers are as concerned about the welfare of their children as are all other mothers. And I believe the day care rules should afford them the same choices and opportunities available to everyone else.

Sincerely,

Daniel Patrick Moynihan

The Honorable Jo Anne Barnhart
Administration for Children & Families
Department of Health and Human Services
Washington D.C. 20447

HAROLD E. FORD, TENNESSEE, CHAIRMAN
SUBCOMMITTEE ON HUMAN RESOURCES

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ROD CHANDLER, WASHINGTON

Ex Officio:
DAN ROSTENKOWSKI, ILLINOIS
BILL ARCHER, TEXAS

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

DAN ROSTENKOWSKI, ILLINOIS, CHAIRMAN
COMMITTEE ON WAYS AND MEANS

ROBERT J. LEONARD, CHIEF COUNSEL AND
STAFF DIRECTOR
WENDELL E. PRIMUS, CHIEF ECONOMIST
AND SUBCOMMITTEE STAFF DIRECTOR

PHILLIP D. MOSELEY, MINORITY CHIEF OF STAFF
RON HASKINS, SUBCOMMITTEE MINORITY

August 20, 1991

Ms. Jo Anne B. Barnhart
Assistant Secretary
Administration for Children and Families
U.S. Department of Health and Human Services
Sixth Floor
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

Dear Ms. Barnhart:

I am writing to provide you my initial comments on the Department's proposed regulations for the two State grants for child care that were authorized as part of the Omnibus Budget Reconciliation Act of 1990.

Generally, the proposed rules conform to the statute and match Congress' intent. I have, however, several serious concerns with the regulations which I have outlined below.

Grants to States Under Title IV-A for Child Care

Most of my concerns with respect to the new child care grant authorized under title IV-A of the Social Security Act relate to unauthorized reductions in the flexibility of States to design their child care programs. State flexibility is the major concept underlying the statutory language for the grant program. The conference report also includes language which clearly states that "it is the intent of the conferees that States will have maximum flexibility in determining how these new grant funds are used."

257.41(a)(2) Applicable standards

Of greatest concern is the Administration's interpretation of the statute's provisions relating to child care standards. Here the Department seeks to elevate a concept that is not even implied in the legislation (parental choice) above a concept that is clearly expressed in the statute (State flexibility). The statute allows each State to determine what child care standards will apply to a particular day care arrangement.

Yet, under the banner of "parental choice" the regulations seek to limit the ability of States to require higher standards for publicly subsidized child care than for privately arranged care. I strongly urge that the final regulations be revised to mirror the statute with respect to this matter.

257.41(b)(2) Registration

In addition, the regulations regarding standards would limit a State's flexibility in developing its registration process. The statute requires that all providers of care: (1) meet applicable standards of State and local law, and (2) be licensed, regulated or registered. However, the proposed regulations provide that only licensed or regulated providers can be required to meet standards, thereby limiting the ability of States to impose standards on providers through the registration process. There is no statutory basis for this approach. It is neither Congress' intent nor the statute's effect to limit the ability of States, at their option, to: (1) require that providers meet certain conditions as part of the registration process or (2) collect information from registered providers that would enable the State to screen out those providers that meet the requirements of the program. I strongly urge that final regulations set out the minimum requirements for a State registration process, but not limit the ability of States to include additional requirements.

257.40 Methods of providing child care

The regulations would limit State flexibility in another area where there is no statutory basis for the limitation, again under the banner of "parental choice." Whereas the statute gives States unlimited authority to choose among a range of methods for providing child care under the program, the proposed regulations seek to limit State flexibility by requiring that each State "establish at least one method by which self-arranged child care can be paid." In this matter, I strongly urge the Department to revise the proposed regulations for the program, and the final regulations promulgated pursuant to the enactment of child care provisions under the Family Support Act.

**257.63 Allowable expenditures**

Finally, the Department's regulations would permit States to set a Statewide limit on child care payment rates under the grant. However, the statutory language for the program, unlike that for the child care program under JOBS, does not include authority for a Statewide limit. While I am sympathetic to the discussion in the preamble regarding State budgetary and planning control, the statute is clear that States must pay an amount equal to the lesser of the actual cost of care or the applicable local market rate.

Child Care and Development Block Grant

**98.30(g) Parental choice**

Unlike the title IV-A child care grant, requirements relating to parental choice are included in the Child Care and Development Block Grant. However, these requirements apply only where they are expressed, and are subject to limitations. Yet again, the regulators seek to elevate the concept of "parental choice" where it is not even expressed. The regulations threaten State child care funds if regulation in the State is found to "significantly restrict parental choice."

As established in the Child Care and Development Block Grant, parental choice is the ability of parents to choose a day care provider from among eligible child care providers; i.e., providers that meet certain State and local regulatory requirements, among other requirements. Thus, under the statute, States and localities have the authority to establish the regulatory requirements, and the Federal government has no authority by which to limit them. The Department's assumption that the statute creates competition between two principles -- State flexibility and parental choice -- is not correct here, and the limitations in the proposed rules on State regulation of child care should be deleted.

I would like to add that, in addition to contradicting the statutory language and congressional intent, these proposed regulations are unworkable as drafted. The Department has not defined how it would measure such vague outcomes as "having the effect of limiting parental access or choice from among categories of care or types of providers." The net result would be to discourage States from improving their child care standards, a result, no doubt, that would please few day care providers, but would work to the detriment of the health and wellbeing of children in care.

I plan to hold hearings on the proposed regulations for the two block grants in September shortly after Congress reconvenes. No doubt, in the course of the hearings we will receive detailed testimony on specific improvements needed in the proposed regulations for the two child care grants. I will forward copies of the testimony to you, including statements received for the record, and I urge that you consider the recommendations carefully.

It is my hope that we can work together to ensure greater access to safe child care for low-income families, without excessive limitations on the flexibility of States to design their child care programs.

Sincerely,

Thomas J. Downey
Acting Chairman

TD/yc

HAROLD E. FORD, TENNESSEE, CHAIRMAN
SUBCOMMITTEE ON HUMAN RESOURCES

THOMAS J. DOWNEY, NEW YORK, ACTING CHAIRMAN
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FRED GRANDY, IOWA
ROD CHANDLER, WASHINGTON

Ex Officio:
DAN ROSTENKOWSKI, ILLINOIS
BILL ARCHER, TEXAS

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

DAN ROSTENKOWSKI, ILLINOIS, CHAIRMAN
COMMITTEE ON WAYS AND MEANS

ROBERT J. LEONARD, CHIEF COUNSEL AND
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WENDELL E. PRIMUS, CHIEF ECONOMIST
AND SUBCOMMITTEE STAFF DIRECTOR

PHILLIP D. MOSELEY, MINORITY CHIEF OF STAFF
RON HASKINS, SUBCOMMITTEE MINORITY

August 26, 1991

The Honorable Louis W. Sullivan, MD
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Mr. Secretary:

The Department has once again moved with dispatch in publishing regulations to guide the implementation of complex legislation, this time in the case of the two day care grants enacted by Congress last year. I speak for many of my colleagues, probably including some on the other side of the aisle, in noting with admiration the timeliness of your implementation of these two important grants.

I am also in agreement with the general thrust of both proposed rules. The emphasis on parental choice precisely reflects the intent of Congress. The statute creating the Child Care and Development Block Grant explicitly states this preference. I can tell you from my own experience that both Republicans and Democrats were intent on insuring the maximum degree of parental choice in selecting care. Even a cursory review of the statute reveals that Congress went to extraordinary lengths to insure parental choice. We even went so far as to prohibit states from giving parents certificates of lower value than the amount paid to centers and other providers [see Section 658E(c)(2)(A)].

Based on my experience in working for passage of this legislation, I would guess that you will receive both comments that your regulations go too far in trying to insure parental choice and that your regulations do not go far enough, although the former will almost certainly exceed the latter in number. In any case, I think you have done a good job of charting a middle course between these two extreme positions.

As you state in the preamble to the Block Grant regulations, both statutes contain provisions that emphasize parental rights and states rights. The importance of state flexibility in insuring good day care for parents has been recognized for many years in Congressional legislation. These two grant programs are similar to both Title XX and the JOBS program in supporting state day care regulations and standards by requiring that federal funds be used to purchase care that meets applicable standards of state and local law.

Even so, as often happens in laws passed by Congress, the provisions for parental choice and states' rights are potentially in conflict. One can easily imagine state day care regulations that would make it extremely difficult for parents to choose the type of care they prefer. For example, a member of my staff has called to my attention the certification rules for "Type B" family day care homes in the State of Ohio. The document must be 50 pages in length, is full of bureaucratic jargon, and would almost certainly scare an unsophisticated applicant to death. A young mother thinking of taking in a few children would have second-thoughts if someone happened to drop a copy of these regulations on her toe.

As it happens, a recent issue of Public Welfare, the professional journal of the American Public Welfare Association, contains an article by a former official who worked in Governor Celeste's Democratic Administration in Ohio. He argued that day care regulations like the ones mentioned above were in fact interfering in parental choice. He argues that Ohio, by requiring welfare mothers to use only state-approved care, has created a situation in which families are having difficulty finding care. By contrast, California, which allows parents much greater flexibility in choosing care, has enrolled thousands of mothers in welfare-to-work programs and the mothers have had little difficulty making their own day care arrangements. Here we had good evidence that the potential conflict between parental choice and state's rights is an actual problem in at least one state.

But I have a feeling that barriers to parental choice exist in many states besides Ohio. I am therefore very attracted to the clear position your regulations stake out: when parental choice and state's rights conflict, both the statute and the regulations require that parental rights prevail.

Though I am no great expert in interpreting regulations, it does seem to me that the potential conflict between parental choice and states' rights has been somewhat blown out of proportion. My reading of the proposed regulation for the At-Risk Grant is that, with the exception of relative care, states can have whatever regulations they want -- as long as all care is subject to the same laws and rules. What your regulations prohibit, as I believe they must if they are to faithfully follow the statute, is requiring families using federal dollars to use care that meets additional requirements that do not apply to families using non-publicly funded care.

Having agreed with the scope and intent of your emphasis on parental choice, I can nonetheless understand that some states may think the proposed rule has the effect of requiring them to weaken their regulations or to halt ongoing movement toward stronger regulations. I personally do not agree that your proposed rule actually has this effect, but I recommend that HHS make reasonable efforts to help states avoid this mistaken impression.

There is now lots of talk, for example, about criminal background checks. As I understand the issue, some states are claiming that it might require a couple of months to complete criminal background checks on child care providers. They are claiming that your proposed rule would allow HHS to prohibit this procedure because the waiting period would constitute a barrier to parental choice. Certainly it should be possible to work with states and allow them to grant temporary registration or licensing pending the receipt of background checks.

Perhaps it would be possible for the experts on your staff to identify similar areas in which some flexibility could be granted to states while still preserving the predominant importance of parental choice. Along with most of my Republican colleagues, I am a strong believer in states' rights. One of the few times I would support not giving states maximum flexibility is when state actions restrict parental choice. Even in these cases, however, I would want to make it clear that this is the exception that proves the rule.

Again, congratulations on your excellent and timely regulations. If there is anything I can do to help support them, please let me know.

Sincerely,

E. Clay Shaw Jr.

E. Clay Shaw, Jr.
Member of Congress

NATIONAL
GOVERNORS'
ASSOCIATION

John Ashcroft
Governor of Missouri
Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. [illegible]
Telephone (202) 624-[illegible]

August 23, 1991

Assistant Secretary for
  Children and Families
Attn: Mary Ann Higgins
OFA/JTF, Fifth Floor
370 L'Enfant promenade, S.W.
Washington, D. C. 20447

Dear Ms. Higgins:

Approval of the Child Care and Development Block Grant and the Title IV-A At-Risk Child Care program heralded a significant step forward in increasing the supply of quality child care and for making child care more accessible for the nation's children. The National Governors' Association played a major role in securing passage of the legislation and is now providing technical assistance to states as they implement these programs. While we applaud HHS's diligence in issuance of the regulations for the CCDBG and the At-Risk program in such a timely manner, we, and the states, are concerned that the proposed rules for both programs seriously undermine state efforts to improve the quality of child care for disadvantaged children.

Comments have been submitted previously on the CCDBG. We take this opportunity to again express our concern regarding the provisions that appear to discourage states from imposing minimum standards to ensure that all children receive quality care. The specific provisions are followed by our comments.

Regulation

> §255.4(c)(2) "The care meets applicable standards of State and local law, and/or Tribal law, where applicable. Applicable standards are licensing or regulatory requirements which apply to care of a particular type in the State, local area, or Indian reservation regardless of the source of payment of the care."
>
> §257.41(a)(1) "Child care provided with funds under this part must meet applicable standards of State and local law, and/or Tribal law.
>
> (2)Applicable standards are licensing or regulatory requirements which apply to care of a particular type in the State, local area, or Indian reservation, regardless of the source of payment for the care.

> (b)(1)All providers of care who are not required to meet applicable standards as provided in paragraph (a) of this section and who are not individuals providing care solely to members of the individual's family, must be registered by the State or locality in which the care is provided prior to receiving payment.
>
> (2)Registration procedures must:
>
> (v)Not exclude or have the effect of excluding any categories of child care providers."

Comments

The statute limits funding for child care services to care which meets applicable standards of State and local law and where the provider is licensed, regulated, or registered by the State or locality in which the care is provided. There is no indication in the statute nor in the conference report that Congress intended that states forego or eliminate meaningful registration requirements for child care provided through Title IV-A.

The preamble to the regulations justifies the Administration's position in terms of maximizing parental choice. The preamble further suggests that if the state wishes to regulate child care funded through Title IV-A they must impose such standards on all child care provided in the state. While this is an admirable goal and one which many states are striving for, the regulations prohibit the use of these funds for services to improve the quality of care, including training for child care providers and licensing activities. The preamble suggests that states may use the CCDBG and the Child Care Improvement grants for these purposes. The interim final regulations for the CCDBG limit funding for quality activities and administration to ten percent of the 75 percent; the remaining 25 percent must be split between quality activities and before- and after-school programs. Similarly, limited funding under the Child Care Improvement grants further restricts the states ability to regulate all child care.

The preamble further suggests that should a state's existing registration process fail to meet the requirements under the proposed regulations, that these processes will have to be modified. At the same time, the preamble discusses the concept of a "seamless system of child care services." Both the statute and the regulations for the CCDBG and the Social Services Block grant allow states to impose higher standards on publicly funded child care than those imposed on other types of care. The stated goal of the CCDBG is to improve the "availability, affordability, and quality of child care services." Since both legislative bills were argued and approved at the same time, we do not believe that Congress intended that recipients of AFDC or those at risk of being on AFDC receive less than quality care.

> The proposed regulations coupled with the language in the preamble raise the specter that funds may be denied to a state if potential providers claim that they would be unable to comply and, thus, parental choice is restricted. The vague wording in Section 257.41(b)(2)(v) has the potential to discourage states from mandating even the most basic health and safety standards, including home visits, smoke detectors, heat, and running water. Similarly, the proposed regulations would appear to place states at the mercy of providers who might object to establishment and/or maintenance of meaningful registration requirements, e.g., criminal background checks or checks against child abuse registries.
>
> We urge HHS to give states maximum flexibility to establish or maintain meaningful registration processes and to maintain or establish minimum health and safety standards which will ensure quality child care for all children. We support the concept of parental choice for all families. We believe that registration processes which are overburdensome can be monitored through the state supportive service plans.

The proposed regulations have several positive features. The regulations allow and the preamble encourages state IV-A agencies to contract with other entities to perform administrative functions, including determination of eligibility. This should encourage those individuals who feel uncomfortable approaching the welfare office to use the new program. Making the state plan for At-Risk Child Care an amendment to the state's supportive services plan will reduce the administrative burden on states. We also note the provision to allow families to continue their child care arrangements while the parent is between jobs and to access child care services prior to actually going to work, but after a job offer has been made and accepted.

We appreciate the opportunity for input into the final regulations.

Sincerely,

Raymond C. Scheppach

Raymond C. Scheppach
Executive Director

APWA

AMERICAN PUBLIC WELFARE ASSOCIATION

James L. Solomon, Jr., President
A. Sidney Johnson III, Executive Director

# COMMENTS ON INTERIM FINAL REGULATIONS
# ON THE
# CHILD CARE AND DEVELOPMENT BLOCK GRANT

## Eligibility for Services (section 98.20 of the regulations)

**Issue:** Income eligibility criteria for protective service children

The regulation indicates that to be eligible a child must reside with a parent or parents, or legal guardian, or other person standing in loco parentis whose income does not exceed 75 percent of the state's median income. The regulation does not define "loco parentis" and, as such, does not appear to take into consideration that in some states when a child is placed in foster care the "state" is considered to be "in loco parentis".

Many states reimburse the cost of child care for children who receive protective services or reside with a foster parent regardless of the income of the family or foster parent. This provision would limit access to child care services under the block grant for many children receiving or needing to receive protective services in those states. We are also concerned that the definition of "loco parentis" would preclude foster parents in some states from establishing eligibility on behalf of a child placed in their care.

**Recommendation**

Clarify in regulation that foster parents may be considered "in loco parentis" and allow states the option of defining any child in protective services as a family of one.

## Parental Choice (section 98.30 of the regulations)

**Issue:** Certificates must always be available.

Section 98.30 (e) of the regulations state that child care certificates must be made available to any parents offered child care services. The preamble interprets this section to mean that child care certificates must be available throughout the year and as long as Block Grant funds are available for child care services Grantees must ensure the continued availability of certificates as an alternative to contracted services.

This provision severely limits state flexibility on the methods by which Grantees provide child care services and effectively eliminates the use of contracts in the provision of child care services under the block grant. The regulation implies access to child care certificates is an "entitlement". In addition there is no statutory basis for the restriction on the use of contracts.

**Recommendation**

The requirement that certificates be available throughout the year should be deleted.

If this recommendation is not adopted we propose an alternative to the recommendation and the interim final regulation: We propose:

(a) Grantees assure in their state plan that child care certificates be available throughout the year.

(b) Grantees would be considered meeting the requirement to make certificates available throughout the year even if the supply of certificates were depleted prior to the end of the year as long as the Grantee made a good faith effort to comply with the assurance.

(c) A good faith effort to comply would be substantiated based on a review and approval by HHS of a Grantee's initial estimate and method of estimating need and/or demand for certificates and contracts included as part of the annual application.

(d) If a Grantee's supply of certificates is depleted during the year, HHS could require the Grantee to submit a revised estimating methodology in the following year's application.

(e) In no case would there be a fiscal sanction or requirement to transfer funds from contracts to certificates if a Grantee runs out of certificates and resources are still available for contracts.

(f) If a Grantee cannot comply with the year-round certificate requirement, the regulations should provide for a waiver of the requirement via the state plan or amendment to the state plan.

**Health and Safety (section 98.41), Registration Requirements (section 98.45), and Complaints (section 98.93)**

Issue: Conflicting Direction about Parental Choice and Health

**and Safety and Registration Requirement/Resolving Complaints**

The regulations specify that Grantees assure in their state plan that minimum health and safety requirements apply to providers of child care services except for grandparents, aunts, and uncles. The preamble to the regulations state that such requirements may not be so prohibitive as to limit parental choice. The regulations also require that Grantees assure that providers of child care services who are not licensed or regulated be registered with the Grantee prior to receiving payment. The registration process must be simple and timely and consistent with the safeguards for parental choice.

APWA and the states strongly support implementation of health and safety requirements that ensure adequate protections are in place to protect the health and well-being of children in child care settings under the Block Grant. We commend HHS for providing states great latitude in establishing such requirements in the regulation.

We also commend HHS for providing states with great latitude in establishing a provider registration process. Requirements to establish a simple and timely process appear to facilitate provider access to the child care delivery system.

APWA and the states are concerned, however, that in the spirit of maximizing parental choice the regulations create potentially serious conflicts for Grantees in their efforts to balance quality and choice. Many are particularly concerned that the regulations emphasize parental choice at the expense of ensuring adequate protections for children in care. There is also concern about what constitutes whether state or local rules, procedures or other requirements "significantly" restrict providers or parental access to a wide range of child care options.

**Recommendation**

Modify the regulation to provide that only a Grantee's policy on health and safety and registration can be determined to significantly restrict parental choice or provider access. Disputes or complaints with respect to a Grantee's policy in implementing the requirements under 98.30 and 98.41 and any complaints under 98.93 (we would also include under 98.40) must first be submitted to the Grantee who shall set up a process for review and disposition of disputes and complaints. The process should include a right to appeal of a Grantee's disposition to the Assistant Secretary for Children and Families.

**Payment Rates (section 98.43 of the regulations)**

**Issue: Payment rates cannot be differentiated for regulated vs. unregulated provider**

The regulation states that payment rates for child care must differentiate between categories of care (center-based, group home, etc.) and to children of different age groups, and the additional costs of providing care for children with special needs. Such payment rates cannot be based on the type of provider, such as sectarian care providers, relatives, for-profit providers, and non-profit providers. The regulations do not allow Grantees to distinguish between regulated or unregulated providers within a category of provider.

APWA and the states believe that flexibility should be provided to Grantees to pay different rates to regulated vs. unregulated providers in the same general category of care. If not allowed, the regulations would force states, for example, to pay the same rate for care provided in family day care settings even though the settings, health and safety or regulatory requirements, and cost of providing care may be different.

**Recommendation**

The regulations should provide that Grantees have the option to set lower or higher rates of reimbursement for providers within the same category of care if a provider is subject to different requirements than other providers.

**Child Care Services (section 98.50 of the regulations)**

Issue: Preponderance of the 75 Percent Funds

The regulations require that during the first two years of the Block Grant, Grantees must spend at least 85 percent of the funds on child care services and at least 90 percent of the funds on child care services each year thereafter.

States support Congressional intent--as reflected in the Conference Report to the block grant--that a "preponderance" of funds be spent on child care services, but strongly disagree that preponderance be defined as 85 percent of the funds in the first two years and 90 percent of the funds thereafter. This requirement severely limits state flexibility to operate the program based on state and local need. Specifically, it limits flexibility to allocate resources on activities to improve the availability and quality of child care and to support administrative activities under the program. Both activities are essential if states are to assure parental choice and implement and maintain a child care certificate system.

APWA and the states believe there should be greater balance between investing in child care services and improving availability and quality care than allowed under the regulation. Greater recognition should also be given to the costs of administering the block grant given the requirement for implementing and maintaining an effective and efficient certificate system. Spending of a preponderance of funds on child care services as intended by Congress implied that states spend a "greater" amount of funds on such services or an amount that was larger than what should be spent on improving availability or quality child care. It is argued, therefore, that a state could spend 51 percent of its funds on child care services and technically comply with the intent of Congress.

**Recommendation**

APWA and the states recommend that the preponderance requirement be changed to provide that states spend a "greater" portion of their funds under the 75 percent set aside. In this regard, we propose that preponderance be defined as: no less than 75 percent of the 75 percent set aside be spent on child care services and that no more than 25 percent be spent on activities to improve availability and quality and to administer the program.

Issue: Grantees may not use block grant funds to subsidize rates for child care under Title IV-A.

The preamble states that Grantees may not use block grant funds to subsidize rates for child care under Title IV-A. The basis for this prohibition, according to the preamble, is that federal appropriations law would be violated: "Using block grant funds to contravene the funding limits in the IV-A programs would violate Federal appropriations law, including the axiom that an agency cannot do indirectly what it is not permitted to do directly." (Fed. Reg. pg. 26209)

During APWA meetings on the block grant regulations, a number of states expressed concern that, as a matter of principle, this prohibition severely restricts state flexibility on the use block grant funds for child care services. Others argued that, as a matter of practice, this prohibition would prevent any efforts to develop a uniform payment rate structure in support of the Administration's goal for the program to provide a "seamless service" to families and providers. States felt that given the fact that federal funds under the Block Grant are "capped", that is, not an open-ended entitlement as under Title IV-A, federal expenditures would not increase as a result of Grantee's policy to use block grant funds to subsidize payment rates under Title IV-A. The preamble also fails to take into consideration that parent access to child care would be enhanced since rates, regardless of the funding source, would be the same. This would eliminate any potential for providers to discriminate against families based on source of payment.

**Recommendation**

The preamble and final regulations should clarify that states have the option to use block grant funds to subsidize rates under Title IV-A. The preamble should also clarify that Block Grant funds may be used to supplement rates under Title IV-A up to the 75th percentile.

**Administrative Activities (section 98.52 of the regulations)**

Issue: Defining administrative costs for child care services.

Section 98.52 of the regulations specify that the Grantee must provide an estimate of the total funds that will be used for administrative activities under the block grant by the Grantee and subgrantees. This section identifies a list of possible administrative activities states may include in the list and estimate of administrative costs.

The preamble to this section of the regulation states that Grantees are allowed flexibility in defining administrative costs and that there is no exclusive list of administrative activities from which Grantees must charge to administration. Yet, the regulation includes a list of activities that may be included as administrative costs in the administration and implementation of the program. Both the preamble and regulation fail to distinguish between those costs associated with administration of the program, plan development, monitoring, automation systems development, etc., and those costs associated with the provision of child care services, such as eligibility determination, consumer education, health screening, referrals for child care, authorizing payment of child care via child care certificates, or resolving parental complaints.

**Recommendation**

Eliminate the regulatory language under section 98.52 (b) (1). Allow Grantees, as stated in the preamble, to determine appropriate administrative costs and to identify a list of administrative activities and the costs associated with such activities in the annual application. Grantees should not be required to list those costs associated with the provision of child care as an administrative cost, such as eligibility determination, consumer education, health screening, referrals for child care, authorizing payment of child care via child care certificates, or resolving parental complaints.

**Program Reporting Requirements (sections 98.70 & 98.71)**

Issue: Compatibility of reporting requirements

Both the Block Grant and the At-Risk child care programs require states to report substantial program and financial information in addition to what is already required under Title IV-A. States are very concerned about the lack of compatibility with reporting requirements across the various child care programs and the potential for having to respond to requirements for different data elements, definitions, and reporting formats. Exacerbating the problem is that few states have the management information system capability to meet the reporting requirements for all the programs.

**Recommendation**

The Administration for Children and Families should immediately begin to work closely with states to develop compatible program and financial reporting requirements for the Block Grant, At-Risk, and Title IV-A/Family Support Act child care programs. ACF should also expand efforts to provide information and technical assistance to states in the planning, development, and implementation of child care management information systems.

**Complaints (section 98.93)**

Issue: Complaints must be submitted in writing to the Assistant Secretary ACF.

The regulations require that any complaint (presumably from any interested party) about a Grantee's failure to use Block Grant funds as required by the Act must submit the complaint in writing to the Assistant Secretary for Children and Families. Grantees and states are furnished a copy of the complaint and may provide comments to the department within 60 days.

APWA and the states are concerned that the Assistant Secretary, and not the Grantee or governor, is the initial recipient of a complaint under the complaint process in 98.93. Further, the regulations provide no guidance or parameters outlining the kind of complaint or dispute a Grantee must respond to. This unstructured process could result in Grantees being forced to respond to virtually any complaint regardless of the seriousness of the complaint and whether it was frivolous in nature.

**Recommendation**

Grantees should have responsibility for establishing a complaint process for resolution of disputes or complaints relating to matters of a Grantee's policy implementing the requirements of the Act. The role of the Assistant Secretary should only be to respond to appeals from interested parties where final resolution was not achieved through the Grantee's complaint process.

APWA

AMERICAN PUBLIC WELFARE ASSOCIATION

James L. Solomon, Jr., President
A. Sidney Johnson III, Executive Director

# COMMENTS ON PROPOSED REGULATIONS ON THE AFDC AT-RISK CHILD CARE PROGRAM

## Child Care Standards for AFDC and Transitional Child Care -- Section 255.4(c)(2) and Child Care Standards for At-Risk Child Care -- Section 257.41(a)(2)

The proposed regulation defines applicable standards as licensing or regulatory requirements that are generally applicable to care of a particular type regardless of the source of funding for the care. According to the preamble (56 Fed. Reg. 29056) this means a state may not reject a parent's choice of child care provider under title IV-A because that provider does not meet licensing or regulatory standards for that particular type of care if those standards are not generally applicable to that type of care. The preamble (56 Fed. Reg. 29066) also notes that the provision will have limited impact on states because: a state could extend standards for publicly-funded care to all care; there is no requirement to develop standards or require standards be uniform across all types of care; and states have been paying for care that does not meet publicly-funded care requirements for years via the AFDC disregard.

APWA strongly opposes this proposed change. First, the regulation will have a major impact on states as it fails to recognize the long-standing policy of most states to apply greater protection to child care subsidized with public funds. According to a recent survey conducted by the Children's Defense Fund: only five states allow state funds to go to unregulated family day care without requiring such care to meet any requirements at all; of the 14 states that fully or partially exempt religious-based programs, 11 require these programs to meet all licensing requirements in order to receive public funds; and more than half of the states that pay for relatives through their subsidized child care program require relatives to meet health, safety, or quality requirements of some kind. As such, we strongly disagree with the department's interpretation that this proposed change does not have a significant federalism effect under Executive Order 12612.

We also question the logic behind the rationale in the preamble

(56 Fed. Reg. 29066) that states have been paying for care that does not meet state standards for publicly-funded care for years under the AFDC disregard, and therefore, this proposal would not conflict with existing applicable standards. The AFDC disregard is a deduction of a recognized child care expense and not a "payment" or reimbursement of such an expense. While the department may be accurate in its assertion that expenses were for care that did not meet standards for "publicly-funded care", your assertion fails to also recognize that such care, in some cases, probably did not meet any "applicable standards of state and local law." This is because "public" funds were not used and therefore state and local law did not apply.

Second, while the preamble is accurate that states could extend standards for publicly-funded care to all care, the cost of doing so would be prohibitive given the extensive expansion of staff that would be needed to license providers and monitor compliance of standards. The burden of this cost would be borne by the states since Section 255.4(f)(2) of the regulations specify that administrative costs for licensing are not considered an allowable IV-A cost. And, funding levels for grants to states to improve child care licensing and registration requirements under Section 402(g)(6) would be insufficient to cover the increased cost of licensing. First there is no guarantee that Congress will appropriate funding for these grants, and second, even if funds were appropriated up to the increased levels provided under OBRA 1990, half of the funds must be spent for training of providers.

Finally, and most importantly, it is our belief that it was Congress' intent that federal funds not be used to pay for illegal child care under AFDC, Transitional Child Care, and the At-Risk Child Care programs. This is different from the question of whether a state should be allowed to apply higher standards for AFDC and At-Risk care than apply to private arrangements. In fact in the case of At-Risk care Congress did intend to allow states to impose additional standards and requirements on unregulated providers other than those providing care solely to the family of the individual as evidenced by the requirement that providers who are not licensed or regulated must be registered.

**Recommendation**

Allow states to determine which state and local standards apply to IV-A child care. Such standards may be limited to publicly subsidized child care.

**State IV-A Agency Administration--Section 257.10**

The proposed regulations allow the state IV-A agency to enter into contracts or agreements with other entities to perform administrative functions, including the determination of eligibility, and provide services under the At-Risk Child Care program. This provision does not relieve the state IV-A agency of its overall responsibility for administering the program.

APWA and the states strongly support this provision. It provides the flexibility needed by states to administer and operate the program in a manner consistent with a state's organizational and administrative child care structure. It also facilitates operation of a seamless system of child care at the state and local level.

**Recommendation**

Retain this provision in final rule.

**Eligibility--Section 257.30(a)(3)**

Section 402(i)(1) of the At-Risk statute provides that states may provide child care "...to any low-income family that the State (emphasis added) determines in not receiving aid under the State plan approved under this part; needs such care in order to work; and would be at risk of becoming eligible for aid under the state plan approved under this part if such care were not provided." The proposed regulations require that the state must make a further determination that the family meets this criteria by requiring the state to define "at risk" other than in terms of income.

APWA and the states are opposed to the requirement for an additional condition of eligibility other than in terms of income. We disagree with the preamble (56 Fed. Reg. 29058) that Congress intended to require states to establish this additional test. First, the statutory language explicitly refers to the "state" as having the authority to make the determination whether any low-income family would be at risk of becoming eligible for AFDC if child care were not provided. This was not intended as a requirement for states. Second, APWA was actively involved in the development of this legislation. We were provided oral assurances from Congressional staff drafting the legislative language that it was the explicit intent of Congress that states were to be provided maximum flexibility in defining "low-income", "in order to work", and "at risk". This assurance was affirmed in Conference Report language that states have maximum flexibility in determining the use of the funds for the program (H.R. Rep. No. 101-964 pg. 922).

**Recommendation**

Delete the proposed requirement that the state define "at risk" beyond income eligibility. The proposed requirement should also be deleted from 257.21(b)(1) of the regulations.

**Eligibility--Section 257.30(b)(2)(i)**

The regulations allow the state to provide child care "for any child (age 13 and over) in the family who needs such care and who

... is physically or mentally incapable of caring for himself or herself, as verified by the State based on a determination of a physician or a licensed or certified psychologist..."

APWA and the states oppose this requirement on the basis that: 1) verification of incapacity as specified is an administrative burden to both the state and parents; and 2) it presents a barrier to operation of seamless system of child care as there is no comparable requirement with the Block Grant.

**Recommendation**

Eliminate language in the final rule that incapacity be verified by the state based on the determination of a physician or licensed or certified psychologist. Allow states to determine the extent of verification of incapacity. Similarly, we strongly encourage the department to amend 255.2(a) and 256.2(a) of the Family Support Act regulations by deleting the requirement that verification of incapacity for child care under the Act be consistent with the verification requirements at 250.30(b)(3) for determining exemption from JOBS participation based on capacity.

**Eligibility -- Section 257.30(c)**

The proposed regulations define "in order to work" as including child care necessary to accept employment or to remain employed. This includes providing child child care if child care arrangements would otherwise be lost for up to two weeks prior to the start of employment or for up to one month during a break in employment if subsequent employment has been arranged within that period.

We commend the department for recognizing the importance of providing child care during temporary periods of unemployment. We are concerned, however, that child care as required at 257.30(c)(2) can be provided using At-Risk funds only if employment is scheduled to begin within the one month period. We are concerned about the individual's ability to maintain continuity in her child care arrangement in those circumstances where she has not secured employment within the one month period, but is actively looking for work.

**Recommendation**

Amend the requirements under 257.30(c)(2) to allow states the option of providing up to one month of child care assistance under the At-Risk program for those unemployed individuals who are actively seeking employment and whose child was previously enrolled in the program.

**Allowable Expenditures--Section 257.63**

The proposed regulations restrict federal financial participation to payments within the 75th percentile of providers or slots.

The preamble states that federal appropriations law prohibit supplementing the 75th percentile with federal funds, but does not state whether federal funds can be used to supplement costs up to the 75th percentile.

We opposed this provision under the proposed and final regulations implementing the child care provisions of the Family Support Act on the basis that it: 1) restricted parental choice; and 2) contributed to provider reluctance to accept subsidized children because of lower payment rates. Providing this same limitation under the At-Risk program will only further exacerbate the problem. In addition, given there is no similar requirement under the Block Grant, attempts to implement a seamless system of child care will be thwarted and continuity of child care arrangements unnecessarily disrupted for those families changing subsidy programs.

While we understand the department's rationale for limiting FFP to the 75th percentile under FSA was an attempt to control federal expenditures under an uncapped entitlement program, this same rationale would not seem to apply under the At-Risk program since it is a capped entitlement.

**Recommendation**

Eliminate the 75th percentile limitation for the At-Risk program. Clarify whether federal funds may be used to supplement other federal funds if supplementing FFP under the 75th percentile.

NATIONAL CONFERENCE OF STATE LEGISLATURES

WASHINGTON OFFICE: 444 NORTH CAPITOL STREET, N.W. SUITE 500 WASHINGTON, D.C. 20001
202-624-5400 FAX: 202-737-1069

JOHN MARTIN
SPEAKER OF THE HOUSE
MAINE
PRESIDENT, NCSL

WILLIAM RUSSELL
CHIEF LEGISLATIVE COUNSEL
VERMONT
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

July 9, 1991

The Honorable George Bush
President
The White House
Washington, D.C.

Dear Mr. President:

We are writing to express our disappointment at several recent policy decisions made by members of your Administration. These decisions raise serious questions about the Administration's view of federalism and its approach to relations with state governments. We are particularly frustrated with these initiatives because they are contrary to your own public statements about the partnership between the federal and state governments.

As you know, the National Conference of State Legislatures endorsed the consolidated grant concept that you proposed in your State of the Union address in February. We welcomed your call for greater flexibility for state governments and for protecting the states' ability to be laboratories of democracy. We responded promptly and responsibly with a set of principles for structuring the package and with an illustrative list of programs that could be included. We supported your proposal because it was consistent with NCSL's fervent belief in the capabilities of state governments to solve public problems. It was compatible, too, with our strong opposition to unfunded federal mandates, preemption, and invasion by the federal government of traditional state revenue sources.

We hoped that, even if your consolidated grant proposal were not adopted immediately by Congress, it would establish a framework for other decisions and initiatives taken by members of your Administration. It could, we believed, be a strong and unequivocal signal to officials throughout the federal departments and agencies to look for ways to promote state innovation and flexibility, to avoid mandates and preemption, and to protect state revenue sources.

Unfortunately, very much the opposite has occurred. There have been at least five examples in recent weeks in which federal agencies have reached decisions or launched initiatives that would severely restrict state flexibility, impose mandates, preempt, and place additional, unwarranted financial burdens on state governments. The examples are in the proposed child care regulations, the voluntary donation and provider-specific tax issue, the Clean Air permit regulations, the medical malpractice package, and the mandatory social security regulations.

**Child Care Regulations.** During the negotiations regarding the child care legislation adopted last year, state legislators from states as diverse as Illinois, Missouri, Oklahoma, Louisiana, and Connecticut were instrumental in removing unfunded mandates and other federal standards from the legislation. NCSL based its support of the legislation on the flexibility it provided states to respond to the specific child care needs of their citizens. Regulations offered by the Department of Health and Human Services on June 5 drastically limit state program flexibility, add mandates and administrative burdens, and circumvent state authority.

Most egregious of the changes offered in the regulations is the requirement that states spend 90% of the 75% flexible setaside funds on child services. By drastically limiting states' authority to choose between expanding services and improving quality, the regulations directly violate the terms of the agreement achieved during negotiations over the legislative package.

The regulations address two politically delicate issues that concern us, not for their substance or goals, but rather for their preemption of state laws and authority. Although NCSL does not have a position on your educational choice initiative, we are concerned that the provision in the regulations encouraging parental choice in child care would preempt state authority to establish standards for health and safety. And, in redefining the definition of public funds so they can be used for sectarian purposes, the regulations may preempt state constitutional and statutory provisions that restrict this use of public funds.

Our other objections include (1) a requirement that would forbid states from restricting the number of child care certificates even if federal funds are exhausted; (2) a requirement that narrows the definition of "supplanation,"

(3) selection of September 1990 as the base year for the grant.

**Medicaid (Voluntary Contributions and Provider-Specific Taxes).** While the federal and state governments continue to seek creative and responsible solutions to the nation's health care problems, the cost's of financing health care escalate at an alarming rate. Among ways that many states pay a portion of their share of Medicaid expenses are provider-specific taxes and voluntary contributions or donations. Although both are legitimate under federal law, Richard Darman, Director of the Office of Management and Budget, has attacked them as a "scam" and officials in the Health Care Finance Administration apparently are drafting regulations that would prohibit use of voluntary contributions and possibly limit use of provider-specific taxes. If the OMB and HCFA campaigns are successful, they would severely restrict states' revenue-raising authority and limit their ability to meet their obligations under Medicaid and to provide health care to their poor and elderly populations.

**Clean Air Regulations.** Proposed rules on operating permits under the Clean Air Act severely restrict and preempt state authority. Our objections relate to the following: minor permit amendments, stringency of programs, and fees.

The proposed regulations on minor permit amendments give states only seven days to evaluate a modification to a source's permit authority. If a state fails to perform the evaluation in seven days, the emission increase is automatically approved.

The proposed regulations forbid states from instituting aspects of permit programs more stringent than those in the Clean Air Act. This provision, which clearly would preempt state laws and authority, violates legislative intent and traditional EPA practice to allow states to exceed minimum federal standards.

The provisions regarding fees would require that states base permit fees on actual emissions, rather than allowable emissions. This would create a costly and cumbersome bureaucratic burden on the states that would involve, among other things, continuous monitoring to prove actual emissions.

**Medical Malpractice.** The proposal you put forward in May to reform the medical malpractice system would significantly preempt state tort laws. Included as preemptions in theThe proposed legislation are the cap of $250,000 on awards for non-economic damages and a requirement that states eliminate joint and several liability and the collateral source rule.

**Mandatory Social Security Coverage.** Final regulations issued by the Internal Revenue Service interpreting the Social Security Section of the 1990 Omnibus Budget Reconciliation Act impose significant administrative and financial burdens on state governments. It is our view that these regulations far exceed congressional intent, particularly in requirements concerning minimum benefit rules and immediate vesting.

It is our hope, of course, that these examples are simply aberrations from your goal of offering greater flexibility to states and reducing unnecessary administrative costs. We hope that you would use your office to reverse these five specific decisions and to reemphasize throughout the federal agencies the spirit embodied in your consolidated grant proposal.

Thank you for your consideration of our request. We would be happy to meet with you to discuss this critical matter and to assist in developing mechanisms within the regulatory process to protect against similar decisions in the future.

Sincerely,

John L. Martin

Bud Burke

John L. Martin
Speaker of the House
Maine
President, NCSL

Paul Bud Burke
President of the Senate
Kansas
President-Elect, NCSL

NATIONAL CONFERENCE OF STATE LEGISLATURES

WASHINGTON OFFICE. 444 NORTH CAPITOL STREET, N.W. SUITE 500 WASHINGTON, D.C. 20001
202-624-5400 FAX: 202-737-1069

August 5, 1991

JOHN MARTIN
SPEAKER OF THE HOUSE
MAINE
PRESIDENT, NCSL

WILLIAM RUSSELL
CHIEF LEGISLATIVE COUNSEL
VERMONT
STAFF CHAIR, NCSL

WILLIAM POUND
EXECUTIVE DIRECTOR

Assistant Secretary for Children and Families
Attention: Mark Ragan
Child Care Task Force, 5th Floor
370 L'Enfant Promenade, SW
Washington, DC 20447

Dear Mr. Ragan:

On behalf of the National Conference of State Legislatures (NCSL), I submit the following comments on the interim final rule on the Child Care and Development Block Grant of 1990, 42 U.S.C. 9801. The regulations contain provisions that raise serious questions about the Administration's view of federalism and the partnership between the federal and state government. NCSL strongly believes in the capabilities of state governments to solve public problems. Last year's bipartisan child care agreement in the Omnibus Budget Reconciliation Act of 1990 was hailed by NCSL because it provided states the flexibility to respond to the specific child care needs of their citizens without unfunded mandates or federal standards. The regulations undermine rather than interpret the spirit of that agreement. They circumvent state authority, drastically limit program flexibility, and add unfunded mandates and administrative burdens on the states.

In particular, NCSL objects to the use of an interim final rule for major policy initiatives. This undermines state policymaking and does not allow time for comment prior to implementation of the Act. The regulations were published after the close of the majority of state legislative sessions. State lawmakers will not have had the opportunity to enact measures to comply with the interim final rule. NCSL is in agreement with HHS' concern for quality child care and the need for new child care slots. We believe that these policies are best decided at the state level.

There are certain provisions of the regulations in which we believe HHS does achieve its purpose of providing "broad flexibilities to grantees in designing and administering programs under the Block Grant within the constraints of the Act." It is clear that HHS does recognize state flexibility in certain aspects of the regulation: "We do not specify that programs be statewide, nor do we provide definitions of all terms. We allow flexibility in setting sliding fee scales, in setting payment rates, and in establishing eligibility conditions. The States will serve as laboratories for testing unique solutions to the needs of families targeted by this program." NCSL strongly supports the flexibility given to states to define the activities within the 25% quality funds. We appreciate that the market rate for reimbursement will be state determined and that state definitions of state median income, family structure and "very low income" are maintained.

However, we believe that for the most part, these regulations appear to legislate, rather than interpret the enacted statute. We agree with the regulations that "By its very nature, a block grant provides great flexibility in program design." Unfortunately, we believe that these functions are constrained. 45 CFR Part 96 indicates that state determinations are sufficient in a block grant if they do not violate federal statutes.

We are greatly concerned by the Rule's preamble suggestion that there is little legislative history for the Block Grant. Surely, the negotiations between the Administration and the Congress to form the bipartisan compromise could not have occurred unless earlier versions of child care legislation had been contemplated, evaluated and put up for a vote. Speeches and communications were sent by the President and Administration officials to set out the Administration's child care principles. This included flexibility for states and no federally mandated standards for child care. The Senate decision to drop this provision from S.5, The Act for Better Child Care, signified a turning point in the success of the legislation. The regulations, however, do not correlate to the absence of federal standards and mandates in the statute and attempt to preempt state authority.

It was the Administration in February 1991 that came forward with a budget proposal calling for expanded block grant activity. The proposed regulations are contrary to this proposal, stripping states of their flexibility and their authority to determine who and which institutions should be regulated and to what extent. They determine for the states for what purposes funds must be used, contradicting both legislative intent and basic block grant principles. Contrary to the regulations, we believe that state flexibility is the key to any "block grant" program. Nothing in the statute suggests that the Child Care and Development Block Grant is no less a block grant than the Social Services Block Grant (Title XX of the Social Security Act). The statute describes a block grant with minimum requirements, most on the distribution of the 25% quality funds. We believe that the absence of mandates within 75% of the Block Grant suggests the intent that the distribution of these funds were at the state's authority. Clearly, as the regulations note, administrative funds are not mentioned in the statute and were essential to implement the program. NCSL urges you to restore the nature of this grant and return the apportionment of the 75% funds to the states.

Federalism

The regulations address two politically delicate issues that concern us, not for their substance or goals, but rather for their preemption of state laws and authority. Although NCSL does not have a position on your educational choice initiative, we are concerned that the provision in the regulations encouraging parental choice in child care would preempt state authority to establish or enforce standards for health and safety. And, in redefining the definition of public funds so they can be used for sectarian purposes, the regulations may preempt state constitutional and statutory provisions that restrict this use of public funds.

## Executive Order 12612 on Federalism

Section 2(e) of Executive Order 12612, reaffirmed by President Bush, states: "In most areas of governmental concern, the States uniquely possess the constitutional authority, resources, and the competence to discern the sentiments of the people and to govern accordingly." The regulations do not give sufficient credence to the states. This is particularly true with child care, where states have deliberately established standards for the delivery of child care services. Most of these standards are designed to protect the health and safety of children -- and are of paramount importance. The regulations go beyond the core concerns of the statute to create a superseding authority of "parental choice". This concept is not addressed in the Act as the controlling factor in ensuring initial and continued block grant funding for states, nor as superseding the critical component of state health and safety laws. The flaw in the regulation is that it limits states' ability to decide the level of importance of health and safety regulations and parental choice.

Section 3(c) of Executive Order 12612 urges that "the States (be granted) the maximum administrative discretion possible. Intrusive federal oversight of state administration is neither necessary or desirable." The statute fulfilled the goal of administrative discretion and oversight; the regulations provide the opposite. The Act did not distinguish between contract and certificate child care services in asserting that state laws on health and safety (and even those more stringent) were to be primary. This was a deliberate change from the proposed federally-mandated child care standards in the original Act for Better Child Care Services that initiated the Congressional child care debate. NCSL supported child care legislation only when state authority was maintained. Clearly, parental choice plays a role in state decisions. The Act acknowledged this; the regulations undercut state authority and flexibility.

The potential for claims of liability against the states and the federal government for not protecting children exists. We are disturbed by the damage that also could be done by withholding statewide funds to coerce states to change their statute to accommodate parental choice. In particular, this provision would penalize states for excluding a type or category of care by its standards. Interrupted funding would disrupt and jeopardize child care services in the states. This would undercut the general purpose of the statute and is a coercive mechanism to undermine state authority. It places states in a position of self-denial of their inherent authority to protect vulnerable children from risky, threatening, or basically unhealthy conditions and situations. And it may lead to equating parental choice with risk, negligence, and personal peril.

Section 2(f) of Executive Order 12612 states that individual states and communities are free to experiment with a variety of approaches to public issues. One would expect this Administration to reinforce this basic principle with its child care regulations - but the opposite is true. The regulations close off options for applying broad use of discretionary funds by applying a 90% lock in of "discretionary" funds for "mandatory" direct services. The regulations cut off state discretion to use block grant funds for improved quality and existing slot subsidies. The regulations deny state flexibility to switch funding priorities with its supplantation mandate. All of these suggest denial of freedom to experiment with what are supposed to be flexible dollars. All of these go beyond the requirements of the statute.

Section 3(d) of Executive Order 12612 states: "Refrain to the maximum extent possible from establishing uniform national standards for programs, and, when possible, defer to the states to establish standards." This Administration argued vociferously against national standards for child care in many Department of Labor and President Bush statements, but now contends it needs these regulations to superimpose policy preferences to supersede, and even control, state authority.

As recently as June 18, 1991, the Supreme Court reaffirmed the federal government's limited power to preempt state law under the 10th Amendment and Guarantee Clause of the Constitution. In Gregory v. Ashcroft, Justice O'Connor in the majority opinion states the importance of federalism. Accountability, responsiveness and innovation are hurt by federal preemption, according to the majority decision. Further, the broad scope of the Supremacy Clause gives great advantage to the federal government. A plain statement of the intention to preempt should be a prerequisite of preemption. The statute does not provide the plain statement requiring preemption. In fact, the statute studiously avoids preemption that the Administration now seeks to impose.

**Limits Use of Flexible Block Grant Funds**

In his 1991 State of the Union address, President Bush lauded the "innovative power of states as laboratories". He proposed to turn programs over to the states in a block grant "to allow states to manage more flexibly and efficiently, and to move power and decision-making closer to the people." The proposed child care regulations thwart these objectives, eliminating state ability to manage more flexibly and efficiently by mandating percentages of a discretionary grant for specific purposes.

The child care legislation specifically set-aside 25% of the block grant for early childhood education, before and after school services, and for quality. The remaining 75% of the block grant funds was intended to be used at the state's discretion to fund child care services and activities to improve the availability and quality of child care.

The regulations, however, would require that 90% of the 75% discretionary block grant funds be spent on direct child care services for new slots, thus preventing states from funding improved quality initiatives and increasing subsidies for existing child care slots. The remaining 10% of the 75% is to be used for availability, and quality, and administrative costs. This cap should be eliminated. The regulations need to clarify how the term "preponderance" came to mean 90% of the funds for child care services. No provision in the statute suggests a 90% delineation of funds for services. Further, the statute does not indicate that the service funds are only for new slots. States should be allowed to decide how to distribute the funds and to reimburse existing slots at a higher rate to retain providers.

States are in the best position to determine the appropriate balance between funding subsidies and funding other child care needs Contrary to the regulations, we believe that state flexibility is the key to any "block grant" program. Nothing in the statute suggests that the Child Care and Development Block Grant is no less a block grant than the Social Services Block Grant (Title XX of the Social Security Act). The statute describes a block grant with minimum requirements, most on the distribution of the 25% quality funds. We believe that the absence of mandates within 75% of the Block Grant suggests the intent that the distribution of these funds were at the state's authority. Clearly, as the regulations note, administrative funds are not mentioned in the statute and were essential to implement the program. NCSL urges you to restore the nature of this grant and return the apportionment of the 75% funds to the states.

The legislation recommends five types of activities to improve the quality of child care, which states will be unable to fund under this restriction: resource and referral, training, salary improvements, assistance in meeting standards, and monitoring of compliance and enforcement with licensing and regulatory requirements. Earmarking a block grant violates the very design of flexible money for states. NCSL repeatedly communicated to the Congress and the White House its ardent opposition to earmarking the social services block grant to provide child care funding. We refused to support any legislation that earmarked a block grant as an encroachment on state authority. 45 CFR Part 96 indicates that state determinations are sufficient in a block grant if they do not violate federal statutes. Considering the multitude of administrative and reporting requirements in the regulations and the expense in implementing a certificate program, states are left no room to support quality improvements.

In addition, the regulations prohibit states from using block grant funds to subsidize rates for child care under IV-A (AFDC). The AFDC rate is limited to the 75th percentile of the local market rate and has resulted in shortages in the supply of child care. We suggest that states be allowed to subsidize higher rates at their discretion to ensure seamless service for all clients. That is, states should be allowed to determined the best market rate so that there will not be a two-tiered child care system. This restriction is only mentioned in the Preamble, not in the regulatory language.

**State Use of Public Funds**

NCSL objects to broadening the scope of the preemptive provision of the Act relating to the use of federal funds by sectarian institutions. Under the statute, states may not prohibit the use of federal funds in sectarian institutions. The regulations once again go beyond the law, by not only forbidding that states prohibit such expenditures, but also by preventing the states from imposing any regulation that might limit the expenditure of funds for sectarian purposes. Permitting states to retain the right to regulate the use of funds is in accordance with federalism principles. (See Mechthild, Fritz, "Religion in a Federal System: Diversity Versus

Uniformity" 38 *Kansas Law Review* 39, 70-77 (1989)).

Under the First Amendment of the United States Constitution and comparable state constitutional provisions, the distinction between "sectarian use" and "sectarian institutions" is significant. (See Mechthild, pp. 44-49.) The regulations flagrantly disregard this important distinction. While state and federal laws uniformly forbid the use of public funds for sectarian purposes, to varying degrees some do permit expenditures at sectarian institutions for non-sectarian purposes. The regulations, citing a distinction between certificate and contract-based child care services that does not exist in the statute, cross the wall separating states from sectarian practices and commands that states allow expenditures for sectarian purposes. The method by which this is accomplished again goes beyond the statute. Federal funds that are explicitly not individual assistance grants in the statute are defined, when a certificate is used, as individual assistance grants. The language of this regulation was clearly intended by its authors to stretch the meaning of the statute beyond recognition.

This provision requires states to segregate state and federal funds, if necessary, to ensure that a state constitution or law does not prevent federal block grant funds from being expended for the purposes provided in the Act, without limitation. This surely will not help implement HHS's goal of "seamless" child care service, as funds and, ultimately, services are segregated. Furthermore, HHS regulations cap administrative costs and states may have to spend more than allotted for start-up, implementation and continued block grant operation. States may not be able to spend state money if the above preemption of state constitutional requirements apply.

**State Authority and Parental Choice**

NCSL has no explicit policy on educational or parental choice. However, as we have stated earlier, we are concerned that the provision in the regulations encouraging parental choice in child care would preempt state authority to establish or enforce standards for health and safety. And, in redefining the definition of public funds so they can be used for sectarian purposes, the regulations may preempt state constitutional and statutory provisions that restrict this use of public funds.

The legislation states that all providers must comply with all licensing or regulatory requirements applicable under state and local law; providers not required to be licensed or regulated under state and local law must be registered with the state.

The regulations state that although grantees (states) have flexibility to establish state or local rules in licensing standards, registration, health and safety requirements and payment rates, such requirements must not significantly restrict parental choice. State and local rules, requirements, policies, and procedures cannot either explicitly or operationally result in significant restrictions in the range of child care options. This language implies that a state cannot necessarily compel licensure, regulatory oversight, registration, or health and safety requirements of caregivers.

Block grant money will be withheld if parental choice is restricted. As we stated earlier, we are disturbed by the damage that could be done by withholding statewide funds to coerce states to change their statute to accommodate parental choice. In particular, this provision would penalize states for excluding a type or category of care by its standards. Interrupted funding would disrupt and jeopardize child care services provision in the states. This would undercut the general purpose of the statute and is a coercive mechanism to undermine state authority.

Many states currently require that public funds may only be expended for child care that is properly licensed or certified. The potential for claims of liability against the states and the federal government for not protecting children exists.

Ohio, for example, requires certification for relative provider care, to insure that public dollars are not spent on substandard care, while encouraging parental choice. Florida also requires licensing of all day care homes that receive government funding. California, with a history of providing for parental choice through their voucher program, including providers exempt from licensure, requires that exempt providers provide fingerprints for a criminal records clearance, and provide a health examination or evidence of a clear tuberculosis test. States should be allowed to refuse to pay for care either through contracts or certificates if the care is to be provided by persons who have criminal records or whose health imperils a child in care. We are concerned that the proposed regulations have the potential of putting children at risk and preventing parents from making safe choices.

**Standards**

The legislation states that all child care providers receiving assistance under this block grant must meet all applicable state and local licensing, regulatory or registration requirements. Providers not required to be licensed or regulated must be registered prior to payment being made. And further, "A State is not prohibited from imposing more stringent standards and licensing or regulatory requirements on child care providers receiving assistance under this grant than those imposed on other child care providers in the state."

The legislation also requires states to provide assurances that certain health and safety requirements are in effect within the state: prevention and control of infectious diseases, including immunization; building and physical premises safety; and minimum health and safety training appropriate to the provider setting.

The regulations acknowledge legislative intent, but undermine it by adding a provision that limits the ability of states to set standards, licensing or registration requirements if it "significantly restricts parental choice". This use of "parental choice" as a means to limit health and safety protections seems clearly contrary to Congressional intent. Congress expressly said states could apply higher standards to block grant care. The regulations, however, could have the effect of involving the federal government in reviewing and disapproving all manner of state child care regulations as contrary to parental choice. Current state safety requirements such as fire extinguishers, smoke detectors, criminal background checks, tuberculosis tests, and safety inspections may all be jeopardized.

This condition of "family choice", in conjunction with the proposed regulatory cap of 10% on quality improvements and administration, severely hinder states' ability to support quality improvements and parents' safe choice. The statute does not require either of these provisions. By imposing an arbitrary limit on funding for administration and quality improvement, the regulations restrict the ability of states to address quality in ways that would not impair parental choice. To use an example cited in the regulations: "State or local regulations or policies in areas such as credentialing, schooling or training, space, and staffing ratios cannot significantly limit a parent's choice from among categories of care or types of providers." The limits imposed here, with the prohibition on differential payment rates for licensed and unlicensed care, remove regulatory requirements and fiscal incentives for providers to improve the quality of their child care and the capacity for parents to choose safe child care.

The proposed regulations open the door to litigation opposing state and local regulations, while subjecting state to potential liability if a child is injured in a publicly-funded child care setting. It is curious that HHS is developing performance standards for Head Start at the same time that these regulations prevent states from setting standards for the block grant. We are concerned that this provision is too general. Does any requirement that significantly reduces parental choice apply? We believe this should be at the states' discretion.

**Vouchers**

The proposed regulations would create severe fiscal and constitutional problems for states.

The regulations forbid states to restrict the number of child care certificates. As long as block grant funds remain available for child care services, parents who choose certificates must receive them rather than being placed on a waiting list. This requirement compromises state fiscal planning authority. States will not know when federal funds will be exhausted, how many certificates to plan for, or the effects on contract programs.

While the legislation permits public funds to be used in sectarian institutions, funds must not be used for sectarian purposes or activities. The regulations seem to compound this preemption of state constitutions by redefining certificates as assistance to parents, thus circumventing state prohibitions on the use of public funds for sectarian purposes. Please refer to this letter's sections on Federalism and State Use of Public Funds.

Finally, the tone of the regulations suggest a preference for certificate assistance over contract assistance. This was also reiterated during the HHS-sponsored child care fora in Washington, D.C. and San Francisco when HHS panelists suggested that while states must have a certificate system, they need not run a contract system at all. The statute does not make any distinction between systems to satisfy parental choice.

**Supplementation of Funds**

The legislation requires block grant funds to supplement, not supplant, the amount of federal, state and local funds spent on child care.

The regulations narrow the definition of supplantation, using the states' previous funding year as the base (for example, September 1990 for FY 1991, September 1991 for FY 1992, etc.), thus making a state's decision to increase state child care funding a permanent appropriation.

The regulations are unclear whether state budgetary problems and across the board cuts affect the supplantation requirement. Economic conditions are beyond the control of the state, as well as fiscal constraints brought on by other federal mandates, such as Medicaid. In addition, Department reorganizing could lead to funds dropping below the base level. A state that reorganizes its child care programs to be more efficient could be penalized. Head Start funds should not be included in a state's base, even if a state funds early childhood development. While linking Head Start and child care is a goal of the states, we believe that supplementation should be limited to child care.

**Payment Rates**

The regulations require states, in establishing payment rates, to consider variations in the costs of providing child care between different categories of care (center-based, group home, family and in-home). However, payment rates may not be based on the type of provider, i.e., sectarian, relative, for-profit, or nonprofit providers.

The regulations appear to prohibit states from paying higher rates for higher quality programs. States would then be prohibited from paying higher rates for licensed or regulated care or nationally accredited settings. This restriction on states' use of higher payment rates removes the incentive for child care providers to improve quality and thus promote parents' access to quality services. Many states currently practice this differential payment system, either in lieu of mandatory requirements or to support state requirements. This has served as an incentive for providers to improve quality. The statute does not provide for this circumstance, which is prohibited in the regulations. Once again, states should decide whether this practice inhibits parental choice or restricts child care providers. Furthermore, states will continue to use this practice for their other child care programs, both federal and state, and once again, the HHS goal of seamless service will not be attained.

The regulations interfere with state rights to establish separate funding standards for child care financed by public funds despite language in the legislation: A State is not prohibited from imposing more stringent standards and licensing or regulatory requirements on child care providers receiving assistance under this grant than those imposed on other child care providers in the state.

In Rhode Island, the state has found that centers have been forced to limit the number of "state" slots (subsidized slots) that they can afford to have. Raising the reimbursement rate is a method of increasing staff salaries, and contributing to quality child care. At current market rates, child care workers salaries and benefits are grossly inadequate, leading to high turnover and low levels of staff training. Inadequate rates of reimbursement are limiting the accessibility of child care to those eligible for the sliding scale program. States should be allowed to use block grant funds to increase reimbursement rates to provide high quality child care for the greatest number of children and provide children in the subsidized state system fair access to quality care.

The regulations should expressly provide that states may use block grant funds to supplement payment rates in other local, state, and federally funded child care funding streams.

The regulations require that payment rates be sufficient to provide access "comparable" to those receiving unsubsidized care, for center based, group home, family and in-home child care. Please clarify the definition of comparable access.

Comprehensive federal child care has been an NCSL priority for the last two sessions of Congress. States have enacted and implemented numerous child care programs, including those to enhance child care quality. We believe that states, when given sufficient flexibility, can create innovative programs to meet the department of Health and Human Services' child care goals. Accountability, responsiveness and innovation are hurt by federal preemption. As Justice O'Connor stated in the majority opinion of Gregory v. Ashcroft, "[I]n the tension between federal and state power lies the promise of liberty."

Thank you for your consideration of NCSL comments. We would be happy to meet with you to discuss this critical matter.

Sincerely,

William T. Pound

William T. Pound
Executive Director, NCSL